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IN THE

Supreme Court of the United States

October Term, 1979

No. 78-1614

SCHOOL DISTRICT OF PITTSBURGH,
Appellant,
v.
COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF EDUCATION,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF PENNSYLVANIA

JURISDICTIONAL STATEMENT

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COMMONWEALTH OF PENNSYLVANIA,
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ON APPEAL FROM THE SUPREME COURT OF PENNSYLVANIA

JURISDICTIONAL STATEMENT

The School District of Pittsburgh, appellant, appeals from a final judgment of the Supreme Court of Pennsylvania, dated January 24, 1979, holding that Pennsylvania Act 372 of 1972 does not violate the Establishment Clause of the First Amendment of the Constitution of the United States.

OPINIONS BELOW

The opinion of the Supreme Court of Pennsylvania, which appears in the Appendix hereto, p. 1a, is reported at ..... Pa. ....., 397 A.2d 1154 (1979).

The opinion of the Commonwealth Court of Pennsylvania, dated February 10, 1978, is reported at 33 Pa. Commonwealth Ct. 535, 382 A.2d 772 (1978).

The orders of the Secretary of Education of the Commonwealth of Pennsylvania, dated August 25, 1976 and August 30, 1976, and the supporting opinion are not reported. They are represented in the Appendix hereto, p. 47a, *infra*.

JURISDICTION

The judgment of the Supreme Court of Pennsylvania, sustaining an act of the Pennsylvania Legislature as valid under the Constitution of the United States, was entered on January 24, 1979. No motion for a rehearing was filed.

A notice of appeal to this Court was duly filed in the Supreme Court of Pennsylvania on February 22, 1979. See p. 65a, *infra*.

This appeal is being docketed in this Court within 90 days from entry of the judgment below. The jurisdiction of this Court is evoked under 28 U.S.C. §1257(2).

QUESTION PRESENTED

Whether Pennsylvania Act 372 of 1972 [Act of December 29, 1972, P.L. 1726, No. 372, amending §1361 of the Public School Code of 1949 (24 P.S. §13-1361, as amended)] requiring school districts to transport resident nonpublic school pupils to and from schools located up to 10 miles beyond district boundaries violates the Establishment Clause of the First Amendment of the Constitution of the United States because of the Act's primary effect of advancing religion in addition to fostering excessive entanglement of the state with religion.

CONSTITUTIONAL AND STATUTORY PROVISIONS

FIRST AMENDMENT, UNITED STATES CONSTITUTION:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

ACT OF DECEMBER 29, 1972, P.L. 1726, No. 372, AMENDING §1361 OF THE PUBLIC SCHOOL CODE OF 1949. SECTION 1:

The first paragraph of section 1361, act of March 10, 1949 (P.L. 30), known as the "Public School Code of 1949," amended January 14, 1970 (P.L. 468), is amended to read:

Section 1361. When Provided.—The board of school directors in any school district may, out of the funds of the district, provide for the free transportation of any resident pupil to and from the kindergarten, elementary school, or secondary school in which he is lawfully enrolled, provided that such school is not operated for profit and is located within the district boundaries or outside the district boundaries at a distance not exceeding ten miles by the nearest public highway, except that such ten-mile limit shall not apply to area vocational technical schools which regularly serve eligible district pupils or to special schools and classes approved by the Department of Education, and to and from any points in the Commonwealth in order to provide field trips for any purpose connected with the educational pursuits of the pupils. When provision is made by a board of school directors for the transportation of public school pupils

to and from such schools or to and from any points in the Commonwealth in order to provide field trips as herein provided, the board of school directors shall also make identical provision for the free transportation of pupils who regularly attend nonpublic kindergarten, elementary and high schools not operated for profit to and from such schools or to and from any points in the Commonwealth in order to provide field trips as herein provided. Such transportation of pupils attending nonpublic schools shall be provided during regular school hours on such dates and periods that the nonpublic school not operated for profit is in regular session, according to the school calendar officially adopted by the directors of the same in accordance with provisions of law. The board of school directors shall provide such transportation whenever so required by any of the provisions of this act or of any other act of Assembly.

RAISING THE FEDERAL QUESTION

The Pennsylvania Department of Education initiated this action by filing an Order to Show Cause on February 14, 1974, which was later amended on August 23, 1974. The School District of Pittsburgh, in its Answer to Amended Order to Show Cause, averred that "Act 372 on its face is invalid since it is in violation of the Establishment Clause of the First Amendment of the United States Constitution."

The hearing examiner appointed by the Secretary of Education acknowledged the constitutional challenge to Act 372 made by the School District, but made no judgment as to the constitutionality or unconstitutionality of the Act. In briefs filed by the School District with both the Commonwealth Court of Pennsylvania and the Supreme Court of Pennsylvania, the School District specifically raised the Establishment Clause issue. Both state appellate courts found that Act 372 does not violate the First Amendment's prohibition against laws "respecting the establishment of religion."

STATEMENT OF THE CASE

On December 29, 1972, Pennsylvania Governor Milton J. Shapp approved Act No. 372 of 1972 providing, *inter alia,* for transportation of pupils attending nonpublic schools.

Prior to the passage of Act 372, and through the 1972-73 school year, the School District had been transporting nonpublic school students in accordance with the Act of June 15, 1965, P.L. 133, No. 91, amending Section 1361 of the Public School Code of 1949. Approximately 700 nonpublic school students were being transported along established public school routes at a cost of $150,000. The School District has never had occasion to transport any of its regular students beyond its boundaries, including vocational-technical students.

As a result of the passage of Act 372, the School District adopted a resolution on July 24, 1973, establishing a policy for transportation of nonpublic school students "identical in effect to the policy regarding transportation of public school students heretofore established." Under this expanded program, the School District transported 3,807 nonpublic school students during the 1973-74 school year at a cost to the School District of $477,750.16. All eligible resident pupils attending public or nonpublic not-for-profit schools located within the School District's boundaries received free transportation. For the 1973-74 school year, the School District provided free transportation to 16,825 of its 65,036 public school students.

After being asked by the Department of Education to provide transportation services to nonpublic school children attending school beyond district boundaries, the Department issued its show cause letter to the School

District on February 14, 1974, placing in issue the possible withholding of pupil transportation reimbursements for the 1973-74 school year. In the Department's Amended Order to Show Cause dated August 23, 1974, the Department relied on the School District's alleged refusal to transport students to 20 specified institutions located beyond School District boundaries.

By stipulation between the School District and the Department at time of hearing, it was established that 16 of the 20 specified institutions were affiliated with a bona fide religious institution and 14 of those 16 were affiliated with the Roman Catholic Church. Of the 2,279 School District residents who attended the designated nonpublic schools outside the School District, only 254 attended nonsectarian schools. The vast majority of pupils who were enrolled in sectarian schools attended schools affiliated with the Roman Catholic Church.

An adjudicatory hearing was held during January 1975 before a Hearing Examiner appointed by the Secretary. Briefs were filed by all parties in May 1976, and the Examiner's proposed report was served on July 15, 1976. On August 25, 1976, the Secretary filed his final Order, and on August 30, 1976, filed an Amended Order denying the School District's request for oral argument and adopting the proposed report of the Hearing Examiner. An appeal was taken by the School District to the Commonwealth Court of Pennsylvania, and on February 10, 1978, the Commonwealth Court affrmed that portion of the Secretary of Education's final Order requiring the transportation of eligible school children beyond the School District boundaries, but vacated that portion of the Secretary's Order pertaining to the withholding of the School District's subsidy. Further appeal by the

School District was taken to the Supreme Court of Pennsylvania. The State Supreme Court, on January 24, 1979, entered a Judgment affirming the Judgment of the Commonwealth Court of Pennsylvania.

THE QUESTION IS SUBSTANTIAL

The statutory right of parochial school pupils to be transported to and from schools located beyond school district boundaries has never been addressed by this Court. A requirement to provide such transportation where no similar transportation is provided to regular public school pupils raises a substantial Establishment Clause question.

Over 30 years ago, this Court in ***Everson v. Board of Education of Ewing Twp.***, 330 U.S. 1 (1947) found it constitutionally permissible for the state of New Jersey to offer nonpublic school pupils free transportation services along an established route. The 5-4 majority in the *Everson* case recognized that the New Jersey statute approached the "verge" of the constitutional precipice in the face of the Establishment Clause of the First Amendment, but upheld the program so as not to "inadvertently prohibit New Jersey from extending its general State law benefits to all its citizens . . ." 330 U.S. at 16.

Since 1947, this Court has decided two cases involving the issue of nonpublic school transportation, and on both occasions, has decided not to extend nonpublic school transportation beyond the *Everson* parameters.

In *Luetkemeyer v. Kaufmann,* 419 U.S. 888 (1974), this Court affirmed *per curiam* a three-judge District

Court decision from the Western District of Missouri upholding a state statute which provided bus transportation to public school children, but denied it to nonpublic school children. The appellants had claimed that the statute violated the right of the state's parochial school pupils to equal protection and their right to free exercise of religion.

Three years later in *Wolman v. Walter,* 433 U.S. 229 (1977), this Court invalidated an Ohio statute which, like Pennsylvania Act 372, had a provision mandating that field trip transportation services be provided to nonpublic school pupils if similar services are available to public school pupils. For the first time in an Establishment Clause nonpublic school transportation case, this Court applied the three-part test first articulated in *Lemon v. Kurtzman,* 403 U.S. 602 (1971) and found in *Wolman* that the statute in question fostered excessive governmental entanglement with religion. According to the three-part test, in order to successfully pass a constitutional challenge under the Establishment Clause, a statute must:

1. have a secular purpose;
2. have a "primary effect" that neither advances nor inhibits religion; and,
3. not foster excessive government entanglement with religion.

Application of the three-part test in both *Committee for Public Ed. & Religious Liberty v. Nyquist,* 413 U.S. 756 (1973) and *Sloan v. Lemon,* 413 U.S. 825 (1973) resulted in the invalidation of tuition grants to parents of pupils attending nonpublic schools. Two years later, this Court in *Meek v. Pittenger,* 421 U.S. 349 (1975)

applied the same test and struck down a Pennsylvania statute requiring the state to provide instructional material and auxiliary services to nonpublic school pupils.

A three-judge federal court in Iowa and the District Court of the United States for the District of Rhode Island recently decided cases involving facts which are quite similar to the case at bar. In *Americans United for Separation of Church and State v. Benton,* 413 F.Supp. 955 (S.D. Iowa, 1975), the court carefully reviewed this Court's decisions involving the provision of state aid to nonpublic schools and concluded that 1975 amendments to the Iowa code which provided transportation services to nonpublic school children which were not provided to public school children had an unconstitutional primary effect of advancing religion.

In the *Benton* case, two transportation options were available to nonpublic school students, neither of which were available to public school students. There, as in the instant case, public school students were not being transported across district lines. The *Benton* court found this disparity of treatment to violate the Establishment Clause of the First Amendment. After recognizing the continued vitality of the principles set forth in *Everson,* together with the constitutional parameters established therein, the court held, with respect to the Iowa statute:

> "In this case nonpublic school children are being afforded benefits that are not available to public school students. Thus, the state aid involved here is flowing to a special class composed primarily of sectarian elementary and secondary schools which are an integral part of the religious mission of the churches which support them. This differential treatment 'inescapably results in the direct and

substantial advancement of religious activity' and thus is unconstitutional . . ." [citations and fn. omitted.] 413 F.Supp. at 959-960.

In *Members of the Jamestown School Committee v. Schmidt,* 427 F.Supp. 1338 (D.R.I., 1977), Chief Judge Pettine reviewed Section 16-21-2 of the Rhode Island General Laws which appeared to provide equal transportation benefits to public and nonpublic school pupils alike. The law mandated that the school committee of any town provide transportation for pupils residing within 15 miles of school and attending schools designated to serve residents of a specific area of the state regardless of whether the school served was located within the town of residence.

The District Court stated in its holding:

"Section 16-21-2 is infirm because *in fact* it affords greater options—greater benefits—to children attending the quickly increasing number of regionalized religious schools than to children attending public schools. It has the effect *in fact* of transferring a major cost of regionalization from parents seeking to provide their children a religious education, and the religious bodies themselves, to the taxpayers of the state. This the legislature may not do." (citations omitted.) 427 F.Supp. at 1348.

"It is no answer that §16-21-2, on its face, requires local school committees to bus children to any regional school, public or private, within a fifteen mile radius of the school district. Scrutiny of state laws under the Establishment Clause has never proceeded by blindly nodding approval to labels placed on aid schemes. Where, as here, the effect of those schemes is inescapably to aid sectarian schools, they

will be struck down." (citations omitted.) 427 F.Supp. at 1348-1349.

Pennsylvania Act 372, like the statutes struck down in the *Benton* and *Schmidt* cases, has exceeded the *Everson* parameters and violated the Establishment Clause of the First Amendment. If the Act is permitted to stand, pupils attending nonprofit sectarian schools in Pennsylvania will receive greater benefits in the form of free transportation services than their public school counterparts.

CONCLUSION

For these reasons, this Court should note probable jurisdiction of this appeal.

Respectfully submitted,

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Date: April 1979

[J-331]

IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

SPRINGFIELD SCHOOL DISTRICT, DELAWARE COUNTY, PENNSYLVANIA, Appellant v. DEPARTMENT OF EDUCATION, COMMONWEALTH OF PENNSYLVANIA	No. 385 January Term, 1978 Appeal from the order of the Commonwealth Court of Pennsylvania of April 21, 1978, No. 1586 C.D. 1976.

[J-332]

SCHOOL DISTRICT OF PITTSBURGH, Appellant v. COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF EDUCATION, Appellee and JOSEPH SCOTT and HELEN SCOTT, his wife, and ALPHONSE GREPPI and GLORIA GREPPI, his wife, Intervenors and PATRICK MAIETTA and KATHY MAIETTA, his wife, DAVID SLAIN and BETTY SLAIN, his wife, BERNARD CONNOR and JOANNE CONNOR, his wife, ANGELO BORELLI and PATRICIA BORELLI, his wife, and PAUL DONGILLI and PATRICIA DONGILLI, his wife, Intervenors	No. 101 March Term, 1978 Appeal from the order of the Commonwealth Court of Pennsylvania filed February 10, 1978. No. 1603 C.D. 1976.

[J-350]

PEQUEA VALLEY SCHOOL DISTRICT, Appellant v. COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF EDUCATION, Appellee and FABIO PINI and PATRICIA PINI, his wife, ALLEN LEFEVER and DORIS LEFEVER, his wife, CHRISTIAN G. PEIFFER and LAVERNE PEIFFER, his wife, and MRS. JOSEPH SHORT, Intervenor-Appellees	No. 393 January Term, 1978 Appeal from the order of the Commonwealth Court, No. 1610 C.D. 1976, Affirming the Order of the Secretary of Education.

Opinion

[J-350]

IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT
No. 393 January Term, 1978

PEQUEA VALLEY SCHOOL DISTRICT,
Appellant
v.
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF EDUCATION,
Appellee
and
FABIO PINI and PATRICIA PINI, his wife, ALLEN LEFEVER and DORIS LEFEVER, his wife, CHRISTIAN G. PEIFFER and LAVERNE PEIFFER, his wife, and MRS. JOSEPH SHORT,
Intervenor-Appellees

Appeal from the order of the Commonwealth Court, No. 1610 C.D. 1976, Affirming the Order of the Secretary of Education.

ARGUED: October 19, 1978

Orders at Numbers 101, 385 and 393 are affirmed.

NIX, J.

Mr. Justice O'Brien and former Justice Pomeroy did not participate in the decision of these cases.

Mr. Justice Roberts filed a dissenting opinion in which Mr. Justice Larsen joined.

FILED:

NIX, J.

Appellant school districts are appealing from separate orders of the Commonwealth Court affirming decisions by the Secretary of Education finding the districts to be in violation of the Act of December 29, 1972, P.L. 1726, No. 372, *amending* §1361 of the Public School Code of 1949, Act of March 10, 1949, P.L. 30, Art. XIII, *as amended*, 24 P.S. §13-1361 (1978-79 Supp.) (Act 372). For the following reasons we now affirm the orders of the Commonwealth Court.

Act 372 authorizes local school districts to provide for the free transportation of pupils to public and nonpublic schools. It states in pertinent part:

> The board of school directors in any school district may . . . provide for the free transportation of any resident pupil to and from the kindergarten, elementary school, or secondary school in which he is lawfully enrolled, provided that such school is not operated for profit and is located within the district boundaries or outside the district boundaries at a distance not exceeding ten miles by the nearest public highway, except that such ten-mile limit shall not apply to area vocational technical schools which regularly serve eligible district pupils or to special schools and classes approved by the Department of Education, . . . When provision is made by a board of school directors for the trans-

> portation of public school pupils to and from such schools . . . the board of school directors shall also make identical provision for the free transportation of pupils who regularly attend nonpublic kindergarten, elementary and high schools not operated for profit to and from such schools. . . . Such transportation of pupils attending nonpublic schools shall be provided during regular school hours on such dates and periods that the nonpublic school not operated for profit is in regular session, according to the school calendar officially adopted by the directors of the same in accordance with provisions of law.

There are 505 school districts in Pennsylvania. Appellants are three of the five districts that have failed to comply with Act 372.[1] Pittsburgh and Pequea Valley have refused to transport nonpublic school students beyond the district boundaries. Springfield transports nonpublic school students beyond its district lines only to a distance of the three and one-quarter miles, which is approximately equal to the distance public school students are transported within the district's boundaries. On different dates in 1974, the Secretary of Education issued show cause orders to these three school districts requiring them to give reasons why funds due them on account of reimbursable pupil transportation expenses should not be withheld because of their failure to comply with Act 372. Following separate hearings, the Secretary of Education issued final orders in August and September, 1976, directing the school districts to transport all

1. *See* Briefs for the Department of Education, Commonwealth of Pennsylvania, Appellee, at n.2. The Kiski Area and McKeesport School Districts are the other two recalcitrant districts.

eligible nonpublic school children beyond the school district boundaries in accordance with the ten-mile maximum set forth in Act 372. The Secretary further directed that all transportation reimbursement funds paid by the Commonwealth to the school districts be withheld until there was compliance with the Act.

On February 10, 1978, the Commonwealth Court affirmed in part the final order of the Secretary of Education regarding the Pittsburgh School District. *School District of Pittsburgh v. Commonwealth of Pennsylvania, Department of Education,* 33 Pa. Commw. Ct. 535, 382 A.2d 772 (1978). The court affirmed that portion of the order requiring the transportation of eligible pupils beyond the district's boundaries, but vacated the portion of the order pertaining to the withholding of the reimbursement subsidy.[2] On the strength of that opinion, the Commonwealth Court similarly affirmed in part the orders by the Secretary of Education regarding Springfield and Pequea on April 21 and July 5, 1978, respectively. *Springfield School District v. Commonwealth of Pennsylvania, Department of Education,* 35 Pa. Commw. Ct. 71, 384 A.2d 1049 (1978); *Pequea Valley School District v. Commonwealth of Pennsylvania, Department of Education,* —— Pa. Commw. Ct. ——, 387 A.2d 1022 (1978).

We took jurisdiction of the school districts' appeals pursuant to 42 Pa. C.S. §724(a) (1978) and scheduled joint arguments. Appellants challenged the constitution-

2. The Department of Education has not appealed the Commonwealth Court's ruling that the Department was without authority to order that the school districts' transportation reimbursement subsidies be recovered and withheld until each district complied fully with the requirements of Act 372.

ality of Act 372 under the first and fourteenth amendments to the federal constitution and under three provisions of our state constitution.

Part I

The Applicability of the Establishment Clause

A.

The school districts claim that Act 372 is unconstitutional under the establishment clause of the first amendment to the federal constitution because the Act is a "law respecting the establishment of religion." U. S. Const. amend. I. This clause was made applicable to the states in *Cantwell v. Connecticut,* 310 U.S. 296, 303-05, 60 S. St. 900, 903-04, 84 L.Ed. 1213, 1217-18 (1940).

The United States Supreme Court has developed a three-part test to determine whether a particular state law violates the establishment clause. To pass constitutional muster, the statute under scrutiny must 1) reflect a clearly secular legislative purpose; 2) have a primary effect that neither advances nor inhibits religion; and 3) avoid excessive government entanglement with religion. *Meek v. Pittenger,* 421 U.S. 349, 358, 95 S. Ct. 1753, 1760, 44 L.Ed. 2d 217, 227-28 (1975), and cases cited therein. All three of the test's requirements must be met before the act in question will be permitted to stand. Despite the seeming clarity of this test, commentators and members of the Supreme Court itself have alluded to the difficulties encountered in its application. Prof. Henry J. Abraham had occasion to refer to

> . . . the difficulty, if not perhaps the utter impossibility of creating and drawing a viable, predictable line between the permissible and the impermissible in the realm of the establishment clause in general and in that of the subsection of public and private education in particular. H. Abraham, *Freedom and the Court,* 279 (2d ed. 1972).

Justice Powell stated in *Committee for Public Education & Religious Liberty v. Nyquist,* 413 U.S. 756, 760, 93 S. Ct. 2955, 2959, 37 L.Ed. 2d 948 (1973), that the cases arising under the establishment clause "have presented some of the most perplexing questions to come before this Court." Speaking for the Court in *Walz v. Tax Commission of the City of New York,* 397 U.S. 664, 669, 90 S. Ct. 1409, 1411, 25 L.Ed. 2d 697, 701-02 (1970), Chief Justice Burger observed:

> The course of constitutional neutrality in this area cannot be an absolutely straight line; rigidity could well defeat the basic purpose of [the religion clauses], which is to insure that no religion be sponsored or favored, non commanded, and none inhibited.

The Court in *Meek* assessed the strength and weaknesses of the test as follows:

> These tests constitute a convenient, accurate distillation of this Court's efforts over the past decades to evaluate a wide range of governmental action challenged as violative of the constitutional prohibition against laws "respecting an establishment of religion," and thus provide the proper framework of analysis for the issues presented in the case before us. It is well to emphasize, however, that the tests must not be viewed as setting the precise limits to the necessary constitutional inquiry, but serve only as guidelines with which to identify instances in which the objectives of the

Establishment Clause have been impaired. ***Meek v. Pittenger, supra,*** 421 U.S. at 358-59 (citations omitted).

Before we proceed to analyze the instant statute in light of this test it is helpful to set forth the various objectives to which the establishment clause is addressed. In the first "modern" case involving the establishment clause, ***Everson v. Board of Education of the Township of Ewing,*** 330 U.S. 1, 67 S. Ct. 504, 91 L.Ed. 711 (1947),[3] Justice Black, writing for the five man majority, reviewed the history leading up to the adoption of the establishment clause and then set forth the following view as to its objective:

> The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another.... No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and *vice versa.* In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between church and State." 330 U.S. at 15-16.

This "wall of separation" requires that governmental action must be neutral in its effect upon religion

3. *See* note 5, *infra.*

and religious institutions. Thus in writing for the eight man majority in *Abington School District v. Schempp,* 374 U.S. 203, 83 S. Ct. 1560, 10 L.Ed.2d 844 (1963), Justice Clark explained:

> The place of religion in our society is an exalted one, achieved through a long tradition of reliance on the home, the church and the inviolable citadel of the individual heart and mind. We have come to recognize through bitter experience that it is not within the power of government to invade that citadel, whether its purpose or effect be to aid or oppose, to advance or retard. In the relationship between man and religion, the state is firmly committed to a position of neutrality. *Id.,* 374 U.S. at 226.

This view was echoed by Chief Justice Burger in *Walz v. Tax Commission of the City of New York, supra.* There he wrote:

> The general principle deducible from the First Amendment and all that has been said by the Court is this: that we will not tolerate either governmentally established religion or governmental interference with religion. Short of those expressly proscribed governmental acts there is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference. 397 U.S. at 669.

This concept of "benevolent neutrality" reflects a realization that the "wall of separation" does not require a degree of governmental detachment whereby the state becomes the adversary of religion or insensitive to its needs. As noted in *Walz*

> Separation in this context cannot mean absence of all contact; the complexities of modern life inevitably produce some contact and the fire and police protection received by houses of religious worship are no more than incidental benefits accorded all persons or institutions within a State's boundaries, along with many other exempt organizations. *Id.* at 676.

Thus governmental action is not necessarily proscribed because it results in a benefit to a religious institution, provided the benefit is indirect and incidental. ***E.g.***, ***Everson v. Board of Education, supra.*** Moreover, the determination as to whether a benefit is indirect and incidental is principally a question of degree.

> Primarily among the evils against which the Establishment Clause protects "have been 'sponsorship, financial support, and active involvement of the sovereign in religious activity.' *Walz v. Tax Comm'n, supra,* at 397 U.S. 668; *Lemon v. Kurtzman, supra,* 403 U.S. at 612." *Committee for Public Education & Religious Liberty v. Nyquist, supra,* 413 U.S. at 772. The Court has broadly stated that "[n]o tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they adopt to teach or practice religion." *Everson v. Board of Education,* 330 U.S. 1, 16. But it is clear that not all legislative programs that provide indirect or incidental benefit to a religious institution are prohibited by the Constitution. See *Zorach v. Clauson,* 343 U.S. 306, 312; *Lemon v. Kurtzman, supra,* 403 U.S. at 614. "The problem, like many problems in constitutional law,

> is one of degree." *Zorach v. Clauson, supra,* 343 U.S. at 314. *Meek v. Pittenger, supra,* 421 U.S. at 359.

B.

Proceeding from these basic principles we must examine the instant legislation in light of the three prong test that has been provided. Our first consideration is whether the statute possesses a clearly secular legislative purpose. Act 372 was the product of legislative concern for the welfare of school children travelling between home and school. Protecting the child against the hazards of traffic, the exposure to inclement weather and the designs of persons who would harm them are well recognized secular governmental interests. Providing bus transportation is obviously an appropriate means to accomplish these purposes. This Court has previously expressed the view that a legislative enactment providing for bus transportation for school children was a legitimate legislative action to respond to a real danger. *Rhoades v. Abington Township School Dist.,* 424 Pa. 202, 226 A.2d 53, *cert. denied,* 389 U.S. 846, ***appeal dismissed,*** 389 U.S. 11 (1967).

> In view of the peril hovering over our streets and roads like a miasmatic fog, those charged with concern for the safety of children are duty bound to devise methods and means for saving the little travelers from harm on their way to and from school. Obviously the manner in which to provide these youthful wayfarers with a fair measure of protection against highway mishap is to keep them pedally off the roads and to transport them in vehicles so formidably constructed that they may ward off and parry, to the maximum extent possible,

aggression from other vehicles. The school bus with its large heavy wheels and steel fabricated body seems to be the answer to the worrisome problem. Pennsylvania Secretary of Public Welfare, in testifying on House Bill 381 (later to become Act 91) before the Senate Education Committee, said: "... school bus transportation clearly involves the safety and health of our children." The busing of school children is for their protection against hazards of the roadways and of traffic, against dangers occasioned by exposure to weather, against evils of child molestation.

Rhoades v. Abington Township School Dist., supra at 206-07, 226 A.2d at 57 (footnote omitted).

We are still of the view expressed in *Rhoades* and are satisfied that the current amendment does not in any way reflect upon this aspect of the analysis.[4] We note that the appellants have declined to challenge the constitutionality of the Act upon this ground and thus we need not be detained further as to this aspect of the analysis.

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4. In Rhoades v. Abington Township School District, 424 Pa. 202, 226 A.2d 53, *cert. denied,* 389 U.S. 846, *appeal dismissed,* 389 U.S. 11 (1967), the Court upheld Act 91 against state and federal constitutional challenges. Act 91 amended the Public School Code of 1949 to allow students attending nonpublic schools to be transported by public school buses to and from their schools if such schools were along the "established routes" of the public school buses. *See* 424 Pa. at 220, 224, 226 A.2d at 63, 65. Act 372 amended the Public School Code by eliminating the "established routes" restriction on the public transportation of students attending nonpublic schools. Under Act 372, nonpublic and public school children have the right to be transported to their school even if the school lies up to ten miles outside the school district's boundaries.

C.

The second prong of the test presents a more difficult problem. Does Act 372 have a primary effect that neither advances nor inhibits religion? We are satisfied that under the reasoning of the United States Supreme Court decisions in this area this statute does not have the proscribed primary effect.

The appellees and to a large extent the Commonwealth Court, found that this issue was controlled by the United States Supreme Court's *Everson* opinion[5]

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5. In Everson v. Board of Education of the Township of Ewing, 330 U.S. 1, 67 S. Ct. 504, 91 L.Ed. 711 (1947), the Supreme Court upheld a New Jersey statute which had the same basic objective as Act 372:

> When any school district provides any transportation for public school children to and from school, transportation from any point in such established school route to any other point in such established school route shall be supplied to school children residing in such school district in going to and from school other than a public school, except such school as is operated for profit in whole or in part.

Justice Black's opinion for the five-man majority held that the statute did not violate the federal due process or establishment clauses. The Court held that the primary beneficiaries of the Act were children in general and not the religious schools they attended. It was acknowledged that without the aid provided by the statute, some parents could not afford to send their children to nonpublic schools and that one result of the statute would be to allow some nonpublic school students to remain in those schools. The majority saw such a result as being an indirect and incidental benefit flowing to the nonpublic institution. Because the primary beneficiaries of the statute were the school children and because no state money ever directly reached the coffers of the nonpublic schools, the fact that the nonpublic schools incidentally benefited did not result in the act being unconstitutional.

and the opinion of this Court in *Rhoades v. Abington Township School District, supra.* Regrettably the resolution of this issue is not that simple. After *Everson* and *Rhoades* were decided, United States Supreme Court has been required to discuss the considerations underlying the second prong of the test on a number of occasions. To the extent these subsequent decisions have refined the *Everson* holding, we are required to examine the instant Act accordingly.

In *Wolman v. Walter,* 433 U.S. 229, 97 S. Ct. 2593, 53 L.Ed. 2d 714 (1977), the Supreme Court was faced with a statute quite like Act 372 insofar as it provided that non-public school students should be transported at public expense during field trips for secular educational purposes.[6] At first blush, the *Wolman* field trips, would, like the *Everson* bus program seem to fall within that category of state aid that does not

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In discussing the concept of neutrality required, Justice Black wrote, "State power is no more to be used so as to handicap religions than it is to favor them." 330 U.S. at 18. He stressed that the establishment clause "was intended to erect 'a wall of separation between church and state'." *Id.* at 16. "That wall must be kept high and impregnable. We could not approve the slightest breach." *Id.* at 18. And, although he expressed the view that the New Jersey statute "approaches the verge" of the state's lawful power, *Id.* at 16, he concluded that New Jersey had not breached that wall.

6. It should be noted that this portion of Act 372 is not before us in these appeals. We consequently need not consider the constitutionality of the field trip provision in Act 372. We do note, however, that the field trip provision involved in the *Wolman* case was found to be unconstitutional. Additionally, we note that the state Attorney General has ruled the field trip provision of Act 372 to be unconstitutional in its application to sectarian nonpublic schools. *See* 1977 Op. Att. Gen. No. 15.

impermissibly aid religion. The United States Supreme Court looked farther into the case than the fact that both *Everson* and *Wolman* involved bus transportation of nonpublic school students. The Court in *Wolman* pointed out that:

> . . . although a trip may be to a location that would be of interest to those in public schools, it is the individual teacher who makes a field trip meaningful. The experience begins with the study and discussion of the place to be visited; it continues on location with the teacher pointing out items of interest and stimulating the imagination; and it ends with a discussion of the experience. The field trips are an integral part of the educational experience, and where the teacher works within and for a sectarian institution, an unacceptable risk of fostering of religion is an inevitable by-product. 433 U.S. at 253-54 (citation omitted).

The teaching of *Wolman* is that *Everson* did not provide a blanket approval for all types of school bus programs. It is therefore apparent that we must look beyond the superficial similarity to ascertain the constitutionality of the legislation. It is presently urged that the instant legislation is defective in three respects. Appellants first claim that Act 372 in actual operation results in preferential benefits being accorded to nonpublic school students which are not given equally to public school students. Second, that the dominant beneficiaries of this Act are students attending religious schools, primarily Catholic schools, making the Act unconstitutional. Third, that the indirect effect theory of *Everson* is fallacious. These claims will be discussed *seriatim.*

1.

Appellants advance the proposition that the establishment clause and United States Supreme Court rulings mandate that when the "benevolently neutral" state accords nonpublic schools and their pupils incidental benefits, these benefits must not be more extensive than the same benefits accorded public school students. The school districts point to language in *Everson,* for example, that the establishment clause "requires the state to be a neutral in its relations with" religion, and that the state's power is not to be used to "favor" religion or religious groups. *Everson v. Board of Education, supra,* 330 U.S. at 18. The school districts proceed to reason that they need not transport nonpublic school students out of the district. Pequea Valley School District poses and answers the following question:

> Can the State be said to have maintained its *neutrality* and not to have bestowed a *favor* upon sectarian institutions by virtue of the mandates of Act 372? Considering the irregular and unusual treatment conferred upon parochial school students by Act 372, the answer is obviously, "no."
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> Brief for Pequea Valley School District, Appellant, at 16 (emphasis in the original).

The Pittsburgh School District points out that *Everson* upheld the bus fare program so as not to "inadvertently prohibit New Jersey from extending its *general* State law benefits to *all* its citizens. . . ." 330 U.S. at 16 (emphasis added) Brief for School District of Pittsburgh, Appellant, at 20. Pittsburgh further notes that the United States Supreme Court

has stressed in a number of cases that when religious institutions are benefited by state legislation, such benefits must be the incidental results of the legislation granting the benefits to *all* its citizens. *See, e.g. Board of Education of Central School District No. 1 v. Allen,* 392 U.S. 236, 242, 238, 239, 241, 243, 88 S. Ct. 1923, 20 L.Ed. 2d 1060 (1968) (upholding New York law providing for the direct free loan of secular textbooks to all public and nonpublic school children in the state); *Lemon v. Kurtzman,* 403 U.S. 602, 616, 91 S. Ct. 2105, 29 L.Ed. 2d 745 (1971) (striking down Pennsylvania and Rhode Island statutes providing state aid to nonpublic schools for teachers' salaries, and distinguishing such aid from constitutionally permitted state programs such as "[b]us transportation . . . supplied in common to all students"). Also, in *Sloan v. Lemon,* 413 U.S. 825, 93 S. Ct. 2982, 37 L.Ed. 2d 939 (1973) in striking down a Pennsylvania statute providing tuition grants to parents of nonpublic school students, the United States Supreme Court stated:

> . . . The State has singled out a class of its citizens for a special economic benefit. Whether that benefit be viewed as a simple tuition subsidy, as an incentive to parents to send their children to sectarian schools, or as a reward for having done so, at bottom its intended consequence is to preserve and support religion-oriented institutions. We think it plain that this is quite unlike the sort of "indirect" and "incidental" benefits that flowed to sectarian schools from programs aiding *all* parents by supplying bus transportation and secular textbooks for their children. Such benefits were carefully restricted to the purely secular side of

church-affiliated institutions and provided no special aid for those who had chosen to support religious schools. Yet such aid approached the "verge" of the constitutionally impermissible. *Everson v. Board of Education,* 330 U.S. 1, 16 (1947). In *Lemon v. Kurtzman,* we declined to allow *Everson* to be used as the "platform for yet further steps" in granting assistance to "institutions whose legitimate needs are growing and whose interests have substantial political support." 403 U.S., at 624. Again today we decline to approach or overstep the "precipice" against which the Establishment Clause protects. We hold that Pennsylvania's tuition grant scheme violates the constitutional mandate against the "sponsorship" or "financial support" of religion or religious institutions. 413 U.S. at 832-33 (emphasis in original).

Appellants' arguments on this point are based on the supposition that Act 372 confers unequal benefits upon students attending nonpublic schools. This is not the case. The statute requires that nonpublic school students receive transportation opportunities "identical" to those accorded public school students with the proviso that the district is not required to bus *any* student farther than ten miles from the district's borders. "Identical" in this context means that public and nonpublic school students must be bused *to their schools* if such schools are within the ten mile limit.[7] School

7. We agree with the analysis of the Commonwealth Court as to this point:

> The Act means (1) that if the district chooses to provide free transportation at all it shall provide it to all pupils, public and nonpublic, attending schools within the district or without the district at a distance not exceeding ten miles, and (2) that the transportation services provided to nonpublic school pupils must be the same as those provided to public school pupils.

School District of Pittsburgh v. Commonwealth of Pennsylvania, Department of Education, 33 Pa. Commw. Ct. 535, 550-51, 382 A.2d 772, 779 (1978).

district boundaries are not sacrosanct; they are only flexible political lines drawn to accommodate the efficient administration of the educational system of this Commonwealth. It was clearly within the power of the General Assembly to enact the ten mile proviso in Act 372. The benefit sought to be conferred upon all students attending nonprofit schools was the right to free transportation to those schools. The maximum distance is the same for both public and nonpublic school students. The fact that the distance was computed in mileage and not confined to school district lines, we think, is of no constitutional consequence. On its face, then, because it confers its benefits equally upon students attending public and nonpublic schools, Act 372 does not violate the establishment clause by favoring a religious group.

Additionally, appellants contend that Act 372 is unconstitutional in its application. The three school districts have adopted pupil busing policies that prohibit the transportation of public school students out of the district. Thus, they contend, by forcing them to bus nonpublic school students out of the district these nonpublic school students receive "favors" or benefits not given to public school students. This argument misinterprets the requirements of Act 372. As stated above, Act 372 requires the school district to bus nonpublic school students to their schools if the

district also has decided to bus public school students to the public schools. The maximum permissible distance in both cases is up to ten miles outside the school district's boundaries. The fact that appellants have of their own volition decided not to bus public school students up to ten miles outside their districts has no bearing on the statutorily imposed duty of the districts to bus nonpublic school students to their nonpublic schools once the district has undertaken to transport public school children.[8]

Appellants rely heavily upon two United States district court opinions to support their position that Act 372 fails this second prong of the establishment test. In *Americans United for Separation of Church and State v. Benton,* 413 F.Supp. 955 (S.D. Iowa, 1975) (three-judge court per 28 U.S.C. §§2281, 2284 (1970)), the court issued a permanent injunction against the use of public funds to implement amendments to the Iowa school transportation program. The statutory scheme in Iowa drastically differs from the one before us. *By law* Iowa forbade the extra-district transportation of public school students but allowed such transportation for nonpublic school students. Because of this legally mandated disparity in treatment, the court found the statute to violate the establishment clause. The *Benton* decision is clearly distinguishable and appellants' reliance upon it is unjustified.

8. The Commonwealth Court properly noted:

> The facts that the School District of Pittsburgh presently has no occasion to transport public school pupils outside the district and that the school board has declared, contrary to statutory law, that it will not do so, provide no foundation for a declaration that the primary effect of a statute requiring the board to transport all resident pupils to their schools within or without the district is to advance the religion of pupils who would be transported to church schools. Act 372 makes no distinction in conferring its benefits between Pennsylvania public and nonpublic pupils.

Id. at 548-49, 382 A.2d at 778.

Appellants' reliance upon *Members of the Jamestown School Committee v. Scmidt,* 427 F.Supp. 1338 (D.R.I. 1977) is also misplaced. In that case the court declared the statute unconstitutional after determining that it did not in fact provide transportation benefits to public and sectarian school children alike. The court viewed the statute as placing upon the taxpayers the requirement that they provide an additional option to the children attending out-of-district nonpublic—primarily sectarian—schools; an option not offered to public school students.[9] As we have previously indicated, Act 372 provides for equality of treatment in the transportation of public and nonpublic students.

2.

Appellants contend that Act 372 is an artifice whereby students attending church-related schools are

9. We do not accept the district court's implicit premise that the equality of benefit is to be determined by a comparison of the cost involved. The benefit provided is safe transportation to and from school for all students; the fact that the cost of conferring this benefit may vary is not significant for this purpose. A constitutional consideration would arise only if the cost of transportation for the students attending sectarian schools was so disproportionate that it became apparent that the transportation provided to the public school youngster was merely a ruse to confer a benefit to the sectarian school pupil. Such is clearly not the case here.

favored under the guise of benefitting all students. *See, Meek v. Pittenger, supra,* 421 U.S. at 365; *Sloan v. Lemon, supra,* 413 U.S. at 832-33. They stress, and we agree that of the nonpublic school students affected by this Act, the overwhelming majority attend church-related schools.[10] This special "favor" argument was dependent upon appellants initial claim that Act 372 did not benefit public and nonpublic students alike. However, as we have expressed, this Act does not confer upon nonpublic school students greater transportation opportunities than it does upon public school students. Having determined that Act 372 provides identical benefit for all students, public as well as nonpublic, it is of no consequence that the nonpublic schools are predominantly church-related.

This instant statute is readily distinguishable from the legislation that was found to be constitutionally

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10. In the Pittsburgh case, for example, the parties stipulated that eighteen of the nineteen nonpublic schools whose students benefit under Act 372 are affiliated with religious institutions. Fifteen of those eighteen are affiliated with the Roman Catholic Church. Brief for School District of Pittsburgh, Appellant, at 22. In 1975, the Supreme Court stated that "of the 1,320 nonpublic schools in Pennsylvania that comply with the requirements of the compulsory-attendance law . . . more than 75% are church-related or religiously affiliated educational institutions." Meek v. Pittenger, 421 U.S. 349, 364, 95 S. Ct. 1753, 1763. 44 L.Ed. 2d 217 (1975). *See also* Sloan v. Lemon. 413 U.S. 825, 830, 93 S. Ct. 2982, 37 L.Ed. 2d 939 (1973) (in 1973, more than 90% of the children attending nonpublic schools in Pennsylvania were enrolled in religiously affiliated schools); Lemon v. Kurtzman, 403 U.S. 602, 610, 91 S. Ct. 2105, 29 L.Ed. 2d 745 (1971) (in 1969 more than 96% of the nonpublic school students attending church-related schools, most of which were affiliated with the Roman Catholic church).

infirm in *Sloan*. There, the Court held unconstitutional a statute whereby parents of children attending nonpublic schools were reimbursed by the state for a portion of the nonpublic school tuition. There was no comparable provision to benefit the parents of public school children. The Court distinguished such special class legislation from constitutionally permissible state aid benefitting all students:

> We think it plain that this is quite unlike the sort of "indirect" and "incidental" benefits that flowed to sectarian schools from programs aiding *all* parents by supplying bus transportation and secular textbooks for their children. *Sloan v. Lemon, supra,* 413 U.S. at 832. (emphasis in original).

Consequently, we do not believe Act 372 runs afoul of the Court's ruling in the *Sloan* case.

Meek v. Pittenger also does not support appellants' position. In that case the Court struck down a Pennsylvania law providing for the direct loan to nonpublic *schools* of instructional materials,[11] but upheld the direct loan to nonpublic school *students* of secular textbooks, even though 75% of the students in these nonpublic schools attended church-related institutions. *Meek v. Pittenger, supra,* 421 U.S. at 364. The Court determined that the textbook provision was indistinguishable from the New York statute upheld in *Board of Education v. Allen,* 392 U.S. 236, 88 S. Ct. 1923, 20 L.Ed. 2d 1060 (1968)[12] and concluded that Pennsyl-

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11. Where the nonpublic school rather than the child is the recipient of state funded services, "this fact alone may be sufficient to invalidate the program as impermissible direct aid." Wolman v. Walter, 433 U.S. 229, 253, 97 S. Ct. 2593, 2608, 53 L.Ed. 2d 714 (1977).

12. In discussing the *Allen* case, the Court in *Meek* stated:

vania's textbook program was constitutional because the state "merely makes available to all children the benefits of a general program to lend school books free of charge." *Meek v. Pittenger, supra,* 421 U.S. at 362. Additionally, the Court stated:

> It is, of course, true that as part of general legislation made available to all students, a State may include church-related schools in programs providing bus transportation, school lunches, and public health facilities—secular and nonideological services unrelated to the primary, religion-oriented educational function of the sectarian school. The indirect and incidental benefits to church-related schools from those programs do not offend the constitutional prohibition against establishment of religion. *Id.,* at 364-65 (citations omitted).

Approval of New York's textbook loan program in the *Allen* case was based primarily on this Court's earlier decision in *Everson v. Board of Education, supra,* holding that the constitutional Prohibition against laws "respecting an establishment of religion" did not prevent "New Jersey from spending tax-raised funds to pay the bus fares of parochial school pupils as a part of a general program under which it pays the fares of pupils attending public and other schools." 330 U.S., at 17. Similarly, the Court in *Allen* found that the New York textbook law "merely makes available to all children the benefits of a general program to lend school books free of charge. Books are furnished at the request of the pupil and ownership remains, at least technically, in the State. Thus no funds or books are furnished to parochial schools, and the financial benefit is to parents and children, not to schools." 392 U.S., at 243-244. The Court conceded that provision of free textbooks might make it "more likely that some children choose to attend a sectarian school, but that was true of the state-paid bus fares in *Everson* and does not alone demonstrate an unconstitutional degree of support for a religious institution." *Id.,* at 244. Meek v. Pittenger. 421, U.S. 349. 359-60, 95 S. Ct. 1753, 1760-61, 44 L.Ed. 2d 217 (1975).

3.

Pequea contends that despite the Supreme Court's contrary holding in *Everson v. Board of Education,* the primary effect of the public transportation of parochial school students is to aid in the establishment of religion. Pequea argues that the Supreme Court's analysis of the New Jersey transportation statute in *Everson* was faulty and contains "numerous fallacies and inconsistencies . . . which should preclude the *Everson* decision from serving as a binding legal precedent" in the cases now before us. Brief for Pequea Valley School District, Appellant, at 19. Primarily, Pequea contends that "the benefits conferred upon sectarian schools by virtue of mandatory busing laws, such as Act 372, are not as secondary or indirect as the majority in *Everson* would have it seem." *Id.,* at 20.

Although Pequea's arguments against following *Everson's* indirect effect theory have gained some support,[13] this Court is not at liberty to disregard a case

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13. We note that Pequea is not alone in its assault upon that portion of the *Everson* decision. The vote in that case was five to four, and the opinion engendered two well-considered dissents. Justice Douglas, who voted with the majority in *Everson,* later defected to the side of the dissenters. In Engel v. Vitale, 370 U.S. 421, 82 S. Ct. 1261, 8 L.Ed. 2d 601 (1962) (striking down a nondenominational prayer composed by state authorities for use in public schools), Justice Douglas wrote a concurring opinion in which he reconsidered the *Everson* decision and, finding it to have been inconsistent with

so fundamental in the jurisprudence of the establishment clause. Indeed, the *Everson* opinion has been acknowledged in all recent cases arising under this clause. *See, e.g., Meek v. Pittenger, supra,* 421 U.S. at 359-60; *Committee for Public Education & Religious Liberty v. Nyquist, supra,* 413 U.S. at 770-75; *Lemon v. Kurtzman, supra,* 403 U.S. at 611-12; *Board of Education v. Allen, supra,* 392 U.S. at 241-44. Consequently, we must decline Pequea's call to renounce the *Everson* opinion.

We are satisfied that the indirect and incidental benefit concept of *Everson* as refined by subsequent decisions, permits the type of governmental action which occurred here. Act 372 provides the parents of all school children with the assurance of the safety of their children in travelling to and from school. The fact that this benefit is enjoyed by the child attending parochial school as well as the public school youngster is not the type of benefit which offends the concept of neutrality mandated by the establishment clause.[14]

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the principles of the first amendment religion clauses, stated that Justice Rutledge's dissenting opinion was the better view. He reaffirmed his defection from the *Everson* majority in his dissenting opinion in *Walz v. Tax Commission of the City of New York,* 397 U.S. 664, 90 S. Ct. 1409, 25 L.Ed. 2d 697 (1970) (majority upheld state property tax exemption for religious organizations). Additionally, some commentators also have supported the move to abandon *Everson* and to correct what they consider to be flaws in its reasoning. *See, e.g.,* Carroll, *The Constitution, the Supreme Court, and Religion,* 51 Am. Pol. Sci. Rev. 663 (1967).

14. In this context, it must be noted that the right of parents to send their children to parochial schools is constitutionally protected. *See* Wisconsin v. Yoder, 406 U.S. 205, 92 S. Ct. 1526, 32 L.Ed. 2d 15 (1972); Pierce v. Society of Sisters, 268 U.S. 510, 45 S. Ct. 571, 69 L.Ed. 1070 (1925).

As we noted in *Rhoades,* the "cutting off church schools from these services, so separate and indisputably marked off from the religious function, would make it far more difficult for the schools to operate. But such is obviously not the purpose of the First Amendment." *Rhoades v. Abington Township School District, supra,* 424 Pa. at 212, 226 A.2d at 60.

D.

The third and last prong of the religious establishment test under which the constitutionality of Act 372 must be measured, is the requirement that the Act not result in excessive government entanglement with religion. The requirement of no excessive entanglement was "born of a desire to minimize government intrusion into the religious realm." L. Tribe, *American Constitutional Law* 865 (1978). A finding of excessive entanglement, typically in the administration of the statute in question, can serve directly to invalidate a government program. *Id.,* at 866.[15]

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15. The Constitution also forbids political entanglements. This notion focuses on political division along religious lines. In striking down Pennsylvania and Rhode Island cash grants to nonpublic schools to partially defray the costs of teachers salaries, Chief Justice Burger wrote a classic statement of this issue:

> A broader base of entanglement of yet a different character is presented by the divisive political potential of these state programs. In a community where such a large number of pupils are served by church-related schools, it can be assumed that state assistance will entail considerable political activity. Partisans of parochial schools, understandably concerned with rising costs and sincerely dedicated to both the religious and secular educational missions of their schools, will inevitably champion this cause

The test we must employ in this area was formulated by Chief Justice Burger in *Lemon v. Kurtzman, supra,* 403 U.S. at 615:

> In order to determine whether the government entanglement with religion is excessive, we must examine the character and purposes of the institutions that are benefited, the nature of the aid that the State provides, and the resulting relationship between the government and the religious authority.

The state program must not require a "comprehensive, discriminating, and continuing state surveillance" to ensure that the state aid is used solely for secular purposes. 403 U.S. at 619. Nor must the aid require "state inspection and evaluation of the religious content of a religious organization" because this is the very "sort of entanglement that the Constitution forbids." *Id.,* at 620.

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and promote political action to achieve their goals. Those who oppose state aid, whether for constitutional, religious, or fiscal reasons, will inevitably respond and employ all of the usual political campaign techniques to prevail. Candidates will be forced to declare and voters to choose. It would be unrealistic to ignore the fact that many people confronted with issues of this kind will find their votes aligned with their faith.

Ordinarily political debate and division, however vigorous or even partisan, are normal and healthy manifestations of our democratic system of government, but political division along religious lines was one of the principal evils against which the First Amendment was intended to protect. . . . The potential divisiveness of such conflict is a threat to the normal political process. Lemon v. Kurtzman, 403 U.S. 602, 622, 91 S. Ct. 2105, 2115-2116, 29 L.Ed. 2d 745 (1971) (citations omitted).

In the cases before us, we are concerned with the problem of administrative entanglement.

The Court in *Lemon v. Kurtzman* struck down Pennsylvania and Rhode Island statutes providing cash grants to nonpublic schools in an effort to defray part of the costs of teachers salaries. The Court found that these statutes required excessive interference by the state into the activities of the religious school beneficiaries to ensure that the funds were spent for secular purposes only. Professor Tribe has suggested that the following forms of state aid do not infringe the entanglement concerns of the establishment clause:

> When states provide church-related schools with "secular, neutral, or non-ideological services, facilities, or materials," such as "bus transportation, school lunches, public health services, and secular textbooks supplied in common to all students," the resulting relatively mechanical contacts between church and state do not cross the "blurred, indistinct, and variable barrier" which the establishment clause interposes between the two.

L. Tribe, *American Constitutional Law, supra* at 870, *quoting Lemon v. Kurtzman, supra,* 403 U.S. at 614. *Accord, Wolman v. Walter, supra,* 97 S. Ct. at 2601-05.

In applying the test set forth in *Lemon v. Kurtzman,* we note that the primary and intended beneficiaries of Act 372 are the individual students and not the schools they attend. Any benefits derived from the Act by these schools are remote and incidental. The nature of the aid provided by Act 372 is in the form of free transportation of nonpublic school students to their schools. Unlike the facts in *Lemon v. Kurtzman,* here the religious institutions do not receive any funds under this Act. And, unlike the parents who received cash tuition reimbursements from the state in *Sloan v. Lemon,* here the parents

do not receive any monetary benefit from the state. In the cases before us, the parents receive only the intangible benefit arising from the knowledge that their children are being safely transported to and from their schools. Additionally, this benefit is conferred without regard to whether or not the school attended has a religious mission.

Finally, we must look at the resulting relationship between the government and the religious institution resulting from the state aid. As mentioned earlier, *Wolman v. Walter*[16] involved the constitutionality of field trip transportation at public expense for nonpublic school students who visited secular governmental, industrial, cultural, and scientific centers. The Court found that "it is the individual teacher who makes a field trip meaningful . . . [A]nd where the teacher works within and for a sectarian institution, an unacceptable risk of fostering of religion is an inevitable byproduct." 433 U.S. at 253, 254. It was determined that this state program encouraged excessive entanglement because

> . . . the public school authorities will be unable adequately to insure secular use of the field trip funds without close supervision of the nonpublic teachers. This would create excessive entanglement:
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> "A comprehensive, discriminating, and continuing state surveillance will inevitably be required to ensure that these restrictions are obeyed and the First Amendment otherwise respected. Unlike a book, a teacher cannot be inspected once so as to determine the extent and intent of his or her personal beliefs and subjective acceptance of the limitations imposed by the First Amendment. These phophylactic contacts will involve excessive and enduring entanglement between state and church." Lemon v. Kurtzman, 403 US, at 619, 91 S. Ct. 2105 at 2114, 29 L. Ed. 2d 745.
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> 433 U.S. at 254.

16. *See* footnote (6) and accompanying text, ***supra.***

Appellants would have us invalidate Act 372 because, like the field trips in *Wolman,* the nonpublic school controls the timing, frequency and destination of the busing. Appellants' arguments ignore the key fact upon which *Wolman* was decided: the required regulation or nonpublic school teachers. The Act before us does not in any manner require the state to engage in "a comprehensive, discriminating and continuing" surveillance of the nonpublic school teachers. The relationship that Act 372 creates between the state and nonpublic schools is no different than that existing under prior law. We upheld that relationship against constitutional attack in *Rhoades v. Abington Township School District,* 424 Pa. 202, 226 A.2d 53, *cert. denied,* 389 U.S. 846, *appeal dismissed,* 389 U.S. 11 (1967). The only contact between the state and the nonpublic schools is in the relatively sterile environment of calendar control. Under these circumstances we hold that the relationship between the state and the nonpublic schools created by Act 372 is not one that involves excessive state entanglement with the religious affairs of the nonpublic schools.

E.

In summary, it is our view that Act 372 requires students attending public and nonpublic schools to be transported to their schools if such schools are within ten miles of the school district borders; the Act requires

public and nonpublic school students to have equal transportation services; the Act does not confer greater benefits upon nonpublic school students than upon those attending public schools; that although students attending church-related schools are the predominant nonpublic beneficiaries of the Act, the transportation provided by the Act is totally unrelated to the religious mission of these schools; the primary beneficiaries in fact are the students and any remote benefit received by the nonpublic schools is too indirect and incidental to render the Act constitutionally infirm; and that the Act does not require excessive governmental entanglement with the affairs of the religious schools involved. Consequently, Act 372 on its face and as applied, does not violate the first amendment's prohibition against laws "respecting the establishment of religion."

PART II.

THE EQUAL PROTECTION ARGUMENT

Appellants make two arguments that Act 372 violates the equal protection clause of the fourteenth amendment to the federal constitution.[17] The first is grounded upon their belief that the Act confers greater benefits upon nonpublic school students than upon students attending public school. We rejected this same contention in relation to appellants challenge to Act 372 on establishment clause grounds and believe it fails to

17. In addition, the Pequea Valley School District raises a due process argument against Act 372. Pequea acknowledges that this issue was decided by the United States Supreme Court in Everson v. Board of Education, 330 U.S. 1, 5-8, 67 S. Ct. 504, 91 L.Ed. 711 (1947). We decline to re-open this question and reach a contrary result.

support an equal protection claim. The Act provides total equality in treatment to public and nonpublic school students. The fact that the school districts have refused to transport public school students out of their districts does not require us to invalidate this Act.

The other equal protection challenge to Act 372 centers around the express exclusion of students in nonpublic schools operated for profit from the terms of the coverage of Act 372. Basically Pequea Valley argues that if public and parochial school students receive free transportation, equal protection demands that students attending nonpublic profit-making schools also must receive free transportation. Pequea sees Act 372 as establishing an invidious, intentional and systematic discrimination, arguing that if the legislative purpose of the Act is to provide safe transportation there is no rational basis for conferring that benefit upon some school children and not upon others. We disagree.

The United States Supreme Court has made it clear that legislative classifications will not fail under an equal protection analysis "if any state of facts rationally justifying it is demonstrated to *or perceived* by the courts." *United States v. Maryland Saving-Share Insurance Corp.*, 400 U.S. 4, 6, 91 S. Ct. 16, 17-18, 27 L.Ed.2d 4 (1970) (*per curiam*) (emphasis added). Additionally, "legislatures are presumed to have acted constitutionally even if source materials normally resorted to for ascertaining their grounds for action are otherwise silent," *McDonald v. Board of Election Commissioners of Chicago*, 394 U.S. 802, 809, 89 S. Ct. 1404, 1408, 22 L.Ed.2d 739 (1969). Consequently, the equal protection clause will set aside statutory classifications "only if

no grounds can be *conceived* to justify them." *Id.*, citing cases (emphasis added).[18]

It is not unreasonable to infer from Act 372 that the General Assembly thought that parents who could afford the costs of sending their children to nonpublic profit-making schools could also afford the costs of seeing that their children were safely transported to such proprietary schools. A classification along these lines is neither irrational nor invidious. The local school districts and the Commonwealth itself have only limited resources with which to combat a host of social and economic ills. We cannot say that the legislative refusal to part with some of these scarce resources and provide free transportation to all children attending any school within the Commonwealth lacked a reasonable basis. It is clear that "the Equal Protection Clause does not require that a state must choose between attacking every aspect of a problem or not attacking the problem at all."

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18. We fail to subject Act 372 to "strict scrutiny" because that test does not apply to state social and economic legislation—such as Act 372—even when these laws are challenged as resulting in such disparity of treatment as to violate the equal protection clause. Dandridge v. Williams, 397 U.S. 471, 484, 90 S. Ct. 1153, 25 L.Ed. 2d 491 (1970). In that case the Supreme Court stated:

> In the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification has some "reasonable basis," it does not offend the Constitution simply because the classification "is not made with mathematical nicety or because in practice it results in some inequality." *Id.*, 397 U.S. at 485 (citation omitted).

We recognize that strict scrutiny is appropriate when the challenged legislation infringes upon fundamental rights. We further acknowledge that the equal protection clause includes within its sweep the freedoms of speech and religion contained in the first amendment. Niemotko v. Maryland, 340 U.S. 268, 272, 71 S. Ct. 325, 95 L.Ed. 267 (1951). In this portion of appellants' equal protection claim, however, fundamental rights are not involved. Appellants claim that students attending nonpublic profit-making schools are denied the transportation opportunities that all other children and accorded by Act 372. First, the denial of such transportation opportunities is not an infringement upon fundamental rights in these circumstances. Second, the group denied transportation under the act is not a "suspect class" so as to demand automatic strict scrutiny; and neither is it a "semi-suspect class" so as to demand "intermediate scrutiny" by this Court. Consequently, the traditional equal protection rational basis test is appropriate in resolving appellants' instant claim. We note that when faced with a similar challenge to its pupil transportation program, the New Jersey Supreme Court refused to apply the strict or intermediate scrutiny tests and upheld the program after finding it to rest upon a rational legislative basis. *See* West Morris Regional Board of Education v. Sills, 58 N. J. 464, 279 A.2d 609 *cert. denied*, 404 U.S. 986 (1971).

Dandridge v. Williams, 397 U.S. 471, 386-87, 90 S. Ct. 1153, 1162, 25 L.Ed. 2d 491 (1970). We hold that Act 372 does not violate the equal protection clause of the fourteenth amendment by failing to provide free transportation for students attending private profit making schools.

III.

The State Challenges

Appellants contend that three separate provisions of our state constitution are violated by Act 372 on its face or through the interpretation given it by the Secre-

tary of Education and the Commonwealth Court.[19] We disagree and uphold the Act against these state constitutional challenges.

The school districts claim that Article 1 Section 3, Article 3 Section 15, and Article 3 Section 29, alone or in combination operate to bar the enforcement of Act 372. The relevant portions of these constitutional provisions are as follow:

> *Art. 1, §3. Religious Freedom*
>
> . . . no man can of right be compelled to attend, erect or support any place of worship, or to maintain any ministry against his consent; . . . and no preference shall ever be given by law to any religious establishments or modes of worship.
>
> *Art. 3, §15. Public School Money Not Available To Sectarian Schools*
>
> No money raised for the support of the public schools of the Commonwealth shall be appropriated to or used for the support of any sectarian school.
>
> *Art. 3, §29. Appropriations for Public Assistance, Military Service, Scholarships*
>
> . . . No appropriation shall be made for charitable, educational or benevolent purposes to any person

19. Appellants also urge us to interpret Act 372's use of the word, "identical" to require only the intra-district transportation of nonpublic school students. We have earlier declined to adopt such an interpretation of the statute. Instead, we believe the Act provides the same transportation opportunity for all students; i.e., to and from their schools if such schools are within ten miles of the school district's borders.

> or community nor to any denominational and sectarian institution, corporation or association. . . .

We need not reach these state constitutional challenges unless our constitution provides more stringent limitations upon the church-state relationship than does the federal constitution. In answering this threshold question we believe that the limitations contained in our constitution do not extend beyond those announced by the United States Supreme Court in interpreting the first amendment to the federal constitution.

First, we have earlier held that the provisions of Article I, Section 3 of our constitution do not exceed the limitations in the first amendment's establishment clause. *Wiest v. Mt. Lebanon School District,* 457 Pa. 166, 174, 320 A.2d 362, 366, *cert. denied,* 419 U.S. 967 (1974). In that case we discussed Article I, Section 3 and stated:

> The principles enunciated in this part of our Constitution reflected a concern for the protection of the religious freedoms of Pennsylvanians long before the first amendment to the United States Constitution was made applicable to the states through the fourteenth amendment. Provisions identical to the above section were contained in the Constitutions of 1790 and 1838 and a similar provision was contained in the Constitution of 1776. On the authority of this provision, this Court has prohibited the use of a public schoolroom for Catholic religious instruction after hours, *Hysong v. Gallitzin Borough School District,* 164 Pa. 629, 30 A. 482 (1894), and the use of public school property for sectarian religious purposes when school was not in session, *Bender v. Streabich,* 182 Pa. 251, 37

A. 853 (1897). *The protection of rights and freedoms secured by this section of our Constitution, however, does not transcend the protection of the first amendment of the United States Constitution. Id.* (emphasis added).

Second, the limitations provided in Article III, Sections 15 and 29 apply only when state funds flow to the sectarian school or institution. In the cases before us, no state monies reach the coffers of these church-affiliated schools. Additionally, the transportation provided by Act 372 does not support any sectarian school—it merely confers upon all *children* the right to be transported safely to their schools.[20]

Consequently, our discussion of the issues raised under the federal constitution applies with equal vigor

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20. In *Rhoades v. Abington Township School District,* 424 Pa. 202, 226 A.2d 53, *cert. denied,* 389 U.S. 846, *appeal dismissed,* 389 U.S.11 (1967), Justice Musmanno stated for the Court that transporting a child at public expense to a parochial school cannot "be regarded as supporting a place of worship. The purpose of the school bus is to take children to a structure where they will receive a secular education." *Id.,* at 219, 226 A.2d at 63. Consequently, these school buses "are operated for the benefit of the children who ride it (sic) and not for the benefit of the church which may be associated with the school in which the children receive a State-supervised education." *Id.,* at 222, 226 A.2d at 64. *See also, Schade v. Allegheny County Institution District,* 386 Pa. 507, 512, 126 A.2d 911, 914 (1956) (upholding state laws providing for payment of county-raised tax revenues to denominational or sectarian institutions or homes for the board, care and maintenance of neglected or dependent children on order of the county juvenile court because these funds were, "in legal effect, payments to the child,—not the institution supporting and maintaining him or her").

to the issues raised today by appellants under our state constitution. Accordingly, we reject appellant's challenges to Act 372 that are grounded upon our state constitution.

The Orders at Numbers 101, 385 and 393 are affirmed.

Mr. Justice O'Brien and former Justice Pomeroy did not participate in the decision of these cases.

Mr. Justice Roberts filed a dissenting opinion in which Mr. Justice Larsen joined.

[J-331]

IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

SPRINGFIELD SCHOOL DISTRICT, DELAWARE COUNTY, PENNSYLVANIA, Appellant v. DEPARTMENT OF EDUCATION, COMMONWEALTH OF PENNSYLVANIA	No. 385 January Term, 1978 Appeal from the order of the Commonwealth Court of Pennsylvania of April 29, 1978, No. 1586 C.D. 1976.

Appendix.

[J-332]

SCHOOL DISTRICT OF PITTSBURGH, Appellant v. COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF EDUCATION, Appellee and JOSEPH SCOTT and HELEN SCOTT, his wife, and ALPHONSE GREPPI and GLORIA GREPPI, his wife, Intervenors and PATRICK MAIETTA and KATHY MAIETTA, his wife, DAVID SLAIN and BETTY SLAIN, his wife, BERNARD CONNOR and JOANNE CONNOR, his wife, ANGELO BORELLI and PATRICIA BORELLI, his wife, and PAUL DONGILLI and PATRICIA DONGILLI, his wife, Intervenors	No. 101 March Term, 1978 Appeal from the order of the Commonwealth Court of Pennsylvania filed February 10, 1978, No. 1603 C.D. 1976.

Appendix.

[J-350]

PEQUEA VALLEY SCHOOL DISTRICT, Appellant v. COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF EDUCATION, Appellee and FABIO PINI and PATRICIA PINI, his wife, ALLEN LEFEVER and DORIS LEFEVER, his wife, CHRISTIAN G. PEIFFER and LAVERNE PEIFFER, his wife, and MRS. JOSEPH SHORT, Intervenor-Appellees	No. 393 January Term, 1978 Appeal from the order of the Commonwealth Court, No. 1610 C.D. 1976, Affirming the Order of the Secretary of Education. Filed: Jan. 24, 1979

DISSENTING OPINION

ROBERTS, J.

The majority construes Act 372 to require a school district providing any free transportation to resident pupils also to transport every resident pupil to that pupil's public or nonprofit nonpublic school as far as ten miles outside the district. I disagree with the majority's interpretation of Act 372. The clear and unambiguous language of Act 372 authorizes school districts to exercise discretion and develop their own policies concerning the scope and nature of the transportation services it will offer its residents, so long as "identical" services are provided public and nonprofit nonpublic school students. See 1 Pa.C.S.A. §1921. As thus construed, appellant school districts are in compliance with Act 372, rendering it unnecessary to reach the federal and state constitutional issues which the majority un-

dertakes to decide. See *Mt. Lebanon v. County Board of Elections,* 470 Pa. 317, 322, 368 A.2d 648, 650 (1977) (constitutional questions should be avoided where a non-constitutional ground is dispositive). I therefore dissent.

Act 372 does not require a school district to provide any free transportation to any resident pupil of any school.* The act simply permits use of school district funds to pay for "free transportation of any resident pupil to and from the kindergarten, elementary, or secondary school in which he is lawfully enrolled" should the school board choose to provide such transportation. Two conditions are placed upon this authority to use school district funds for free transportation. The schools to which resident pupils are transported must be "not

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* Act 372 provides in part:

> The board of school directors in any school district may, out of the funds of the district, provide for the free transportation of any resident pupil to and from the kindergarten, elementary school, or secondary school in which he is lawfully enrolled, provided that such school is not operated for profit and is located within the district boundaries or outside the district boundaries at a distance not exceeding ten miles by the nearest public highway, except that such ten-mile limit shall not apply to area vocational technical schools which regularly serve eligible district pupils or to special schools and classes approved by the Department of Education, and to and from any points in the Commonwealth in order to provide field trips for any purpose connected with the educational pursuits of the pupils. When provision is made by a board of school directors for the transportation of public school pupils to and from such schools or to and from any points in the Commonwealth in order to provide field trips as herein provided, the board of school directors shall also make identical provision for the free transportation of pupils who regularly attend nonpublic kindergarten, elementary and high schools not operated for profit to and from such schools or to and from any points in the Commonwealth in order to provide field trips as herein provided. Such transportation of pupils attending nonpublic schools shall be provided during regular school hours on such dates and periods that the nonpublic school not operated for profit is in regular session, according to the school calendar officially adopted by the directors of the same in accordance with provisions of law. The board of school directors shall provide such transportation whenever so required by any of the provisions of this act or of any other act of Assembly.

operated for profit" and must be "located within the district boundaries or outside the district boundaries at a distance not exceeding ten miles by the nearest public highway." Thus, the first sentence of Act 372 grants a school board power to provide free transportation to any nonprofit school up to but not exceeding ten miles outside the district lines. The plain language of Act 372 does not require that, once a school board chooses to transport any student to any nonprofit school within the district or up to ten miles outside the district, it must transport all resident students to all qualifying schools. Rather, the Legislature leaves to the discretion of the school board the geographical scope of busing.

This reading of the first sentence of Act 372 is reaffirmed when compared to the language of the last sentence of the Act's first paragraph and section four of the Act. See 1 Pa.C.S. §1921(a) (statutes to be construed so as to give meaning to all their provisions). The last sentence of the first paragraph provides: "The board of school directors shall provide such transporta-

tion whenever so required by any of the provisions of this act or of any other act of Assembly." The legislature's use of mandatory language here, when contrasted with the permissive language of the first sentence, confirms the view that the first sentence merely grants school districts the power to act. It does not make action of any nature obligatory. Further, Section 4 of Act 372 provides: "Nothing in this act shall be construed to require or authorize the assignment or transportation of any pupil by any board of school directors to any school outside the boundaries of the district in which the pupil resides, except with the consent of the board of school directors, or in the case of a nonpublic school, the authorities responsible therefor, in the district to which the pupil would be assigned, as provided in sections 1310, 1315 and 1316 of the act of March 10, 1949, (P.L. 30) known as the 'Public School Code of 1949,' as amended October 19, 1959 (P.L. 1324)." Had the legislature meant to impose a mandatory duty on school districts to transport students outside the district lines up to a distance not exceeding ten miles, it would have been unnecessary to use the language "require or authorize" in Section 4.

The "identical provision" requirement imposed by the second sentence of Act 372 does not alter this reading. The second sentence mandates that when transportation is provided for public school pupils, "identical provision" must be made for nonpublic school pupils. It does not require transportation not provided public school pupils be provided nonpublic school pupils. Act 372 forbids school boards from treating public school students in a preferential or special manner. So too it is forbidden to treat nonpublic school students in a preferential manner by providing them with transportation not provided public school students. All resident pupils, whether they attend public or nonprofit nonpublic schools must be treated identically. For example, the same mode of transportation must be offered to all students. Public school students may not be transported on school buses while nonpublic school students are given money to subsidize the cost of public transportation. Public school students may not be provided free transportation if they live more than one and a half miles from their schools, while nonpublic school students are required to walk to school unless they live more than two miles away from school. The "identical provision" requirement simply demands that the nature and scope of services afforded public school students be replicated for nonpublic school students. The "identical" requirement does not impose any duty upon school districts to transport all resident pupils to their schools no matter where they may be located within the maximum limit of ten miles outside the district lines. It merely requires that a policy not to transport students over district lines or only a certain distance over district lines be applied to public and nonpublic school students alike. Had the legislature intended to require complete extra-district busing whenever any busing whatsoever is undertaken, it could easily have done so. Instead it only requires that equal opportunities for free transportation be provided to all resident pupils in a school district. Accordingly, I would reverse the order of the Commonwealth Court.

Mr. Justice Larsen joins in this dissenting opinion.

SUPREME COURT OF PENNSYLVANIA

WESTERN DISTRICT

SCHOOL DISTRICT OF PITTSBURGH, Petitioner-Appellant v. COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF EDUCATION, Respondent, and JOSEPH SCOTT and HELEN SCOTT, his wife and ALPHONSE GREPPI and GLORIA GREPPI, his wife, Intervenors, and PATRICK MAIETTA and KATHY MAIETTA, his wife, DAVID SLAIN and BETTY SLAIN, his wife, BERNARD CONNOR and JOANNE CONNOR, his wife, ANGELO BORELLI and PATRICIA BORELLI, his wife, and PAUL DONGILLI and PATRICIA DONGILLI, his wife, Intervenors	No. 101 March Term, 1978

Judgment

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the COMMONWEALTH OF PENNSYLVANIA, be, and the same is hereby AFFIRMED.

BY THE COURT:
SALLY MRVOS
Sally Mrvos, Esquire
Prothonotary

Dated: January 24, 1979.

APPENDIX

COMMONWEALTH OF PENNSYLVANIA

DEPARTMENT OF EDUCATION

IN THE MATTER OF THE ADMINISTRATIVE HEARINGS UNDER ACT 372 SCHOOL DISTRICT OF PITTSBURGH	File No. 1974-4

FINDINGS OF FACT

1. The School District of Pittsburgh (hereinafter referred to as the "School District") is a public school district located in the City of Pittsburgh in the Commonwealth of Pennsylvania.

2. The Department of Education of the Commonwealth of Pennsylvania (hereinafter referred to as "The Department") published and distributed to public and non-public school administrators, under various dates in 1973, guidelines and instructions as to the interpretation of Act 372 of 1972 (24 P.S. 13-1361) (hereinafter referred to as "Act 372").

3. Said guidelines were received by various administrative officers of the School District.

4. The School District, during the school year 1973-1974, provided free transportation to all eligible resident pupils attending both public and non-public, not-for-profit schools located within its boundaries.

5. The School District did not provide any free transportation services for resident pupils to non-public, not-for-profit schools located beyond the School District boundaries during the school year 1973-1974.

6. Parents of non-public school pupils who attended schools located outside the School District boundaries but within ten miles of said boundaries requested transportation services from the School District at various times.

7. The requests of said parents were denied or ignored by the School District.

8. Despite communications from the Department requesting and directing the School District to comply with the mandates of Act 372 as interpreted by the Department of Education from the Department, the School District did not comply with the requirements of Act 372 or with the guidelines sent them by the Department in 1973.

9. Joseph Scott and Helen Scott, his wife, and Alphonse Greppi and Gloria Grippi (sic), his wife, (hereinafter referred to as "Intervenors"), as residents of the School District of Pittsburgh and parents of children attending non-public, not-for-profit schools, were granted permission to intervene as parties in this hearing procedure.

10. The Pennsylvania School Board (sic) Association (hereinafter referred to as "The Association"), while denied permission to intervene as a party in this hearing procedure, was granted the right to attend all hearings and to file briefs and other written arguments in this hearing procedure.

CONCLUSIONS OF LAW

I. Act 372 requires bussing of resident pupils to the non-public schools not operated for profit of their attendance provided such schools are located within the boundaries of the school district of their residence or within ten miles of the boundaries of such school districts, measured by the nearest public highway.

II. The Secretary of Education has the power and the responsibility to withhold or forfeit reimbursement funds due to school districts by the Department of Education for failure to comply with the mandates of statutes of the Commonwealth of Pennsylvania and regulations of the Pennsylvania Department of Education.

CONCLUSIONS AND RECOMMENDATIONS

Two days of hearings were held in this matter and the factual record and written arguments were submitted to this hearing examiner for his recommendation to the Secretary of Education. The School District did not contend that it was factually in compliance with the requirements of Act 372 as interpreted by the Department but contended, instead, that Act 372 did not require transportation as interpreted by the Department and that the School District was in compliance with the proper interpretation of the Act. For reasons set forth more fully in the Discussion attached hereto, the contentions of the School District are rejected and the interpretation urged by the Department is accepted in this report and for purposes of making this hearing examiner's recommendation to the Secretary of Education.

In addition, the School District argued that Act 372 was unconstitutional because it violated the prohibi-

tions contained in the first amendment to the United States Constitution against church-state involvement. The arguments set forth by the School District are beyond the scope and authority of this hearing procedure and are not considered in this report and recommendation.

Finally, the School District contended that the Secretary of Education is without statutory or other proper authority for the forfeiture or withholding of reimbursement funds. The argument is not accepted in this report, again for reasons set forth more fully in the Discussion section hereof. This hearing examiner concludes, for purposes of this report and his recommendation to the Secretary of Education, that the Secretary has the authority to withhold and forfeit funds.

The action of the School District in disregarding and violating the requirements of Act 372 has cost many thousand pupils the benefits conferred on them by that Act. This has resulted in additional expense by non-public school organizations and the parents of pupils attending those schools who would otherwise be entitled to free transportation under the Act. More importantly, the choice of conduct by the School District has cast the entire transportation program designed and implemented by Act 372 into confusion and has denied pupils residing in the School District of Pittsburgh the rights and benefits which have been properly granted to pupils residing in other school districts. Finally, the School District's disregard of the law has set a poor example for other school districts and has thus impeded the enforcement actions by the Department.

The scope of these hearing procedures was limited at their inception to a consideration of reimbursement

funds for the school year 1973-1974 only. As a result, it would be unfair for this hearing procedure to result in any recommendation to the Secretary of Education which involves reimbursement for other than that school year.

It is the considered recommendation of this hearing examiner that any and all reimbursement transportation funds due and owing to the School District of Pittsburgh for the school year 1973-1974 be withheld from said School District because of its violation of and non-compliance with the requirements of Act 372. It is further the recommendation of this hearing examiner that, if the School District of Pittsburgh makes adequate arrangements for the transportation of all pupils residing within the School District and attending non-public and not-for-profit schools located within the School District boundaries or within ten miles of the School District boundaries by the nearest public highway for the upcoming school term and makes adequate arrangements for the reimbursement of all parents of pupils entitled to transportation under Act 372 for the school term 1973-1974, 1974-1975, and 1975-1976, for expenses incurred in providing transportation for their children to and from such schools during those school terms, which such arrangements are reasonably acceptable to all such parents entitled to them, that the reimbursement transportation funds for the school term 1973-1974 not be withheld or forfeited but be paid to the School District.

DISCUSSION

Two days of hearings were held in this matter to collect and build the factual record. All parties involved were then given more than ample opportunity for the

submission of written briefs and arguments. The matter is now, more than two years after its inception, but only a few weeks after its final submission to the hearing examiner, ready for the hearing examiner's report and recommendations.

First, a word about the parties. The Department of Education is the moving party and seeks to withhold or forfeit reimbursement transportation funds due to the School District of Pittsburgh for the School District's alleged non-compliance with Act 372. The School District itself is the responding party.

Joseph Scott and Helen Scott, his wife, and Alphonse Greppi and Gloria Greppi, his wife, were granted permission by the hearing examiner to intervene as parties to the action. The intervenors called witnesses and presented written arguments in the form of briefs. The Pennsylvania School Board (sic) Association, while denied permission to formally intervene as parties, were granted permission to attend the hearings and to submit their arguments in brief form. All the parties participated actively in the hearing and written argument stage of the proceeding. All parties were well represented and their positions and arguments have been articulately advanced.

As said above, the Department has issued a Show Cause Order upon the School District to show cause why funds should not be forfeited or withheld for the School District's non-compliance with Act 372. It is the Department's position that, while the School District transports all public and non-public school pupils attending schools within the boundaries of the School District to the schools of their attendance, the School District does not transport pupils to non-public schools located outside the School District boundaries. The Department interprets Act 372 to require the transportation of resident pupils to non-public schools not operated for profit which are located within ten miles of the School District boundaries.

The School District replies that it is in satisfactory and legal compliance with Act 372 because it provides pupils attending non-public schools not operated for profit with transportation identical to that provided by the School District to resident pupils attending public schools within the school boundaries. The School District further contends that Act 372 is unconstitutional and invalid because it violates the constitutional principles of separation of church and state. The School District finally contends that the Secretary of Education is without proper and legal authority to withhold or forfeit reimbursement funds due a School District for non-compliance with the Statutes of the Commonwealth or the regulations of the Department of Education and further argues that this hearing procedure is limited to the school year 1973-1974 and may not, even if withholding or forfeiture is authorized, result in the withholding or forfeiture of any funds for any years other than the school year 1973-1974.

The three issues raised by the parties will be considered below.

I. Interpretation of Act 372's Ten-Mile Transportation Standard.

The pertinent language of Act 372 amends the first paragraph of Section 1361 of the Act of March 10, 1949 (P.L. 30), as amended, to read as follows:

When provided. — The board of school directors in any school district may, out of the funds of the district, provide for the free transportation of any resident pupil to and from the kindergarten, elementary school, or secondary school in which he is lawfully enrolled, provided that such school is not operated for profit and is located within the district boundaries or outside the district boundaries at a distance not exceeding ten miles by the nearest public highway, except that such ten-mile limit shall not apply to area vocational technical schools which regularly serve eligible district pupils or to special schools and classes approved by the Department of Education, and to and from any points in the Commonwealth in order to provide field trips for any purpose connected with the educational pursuits of the pupils. When provision is made by a board of school directors for the transportation of public school pupils to and from such schools or to and from any points in the Commonwealth in order to provide field trips as herein provided, the board of school directors shall also make identical provision for the free transportation of pupils who regularly attend nonpublic kindergarten, elementary and high schools not operated for profit to and from such schools or to and from any points in the Commonwealth in order to provide field trips as herein provided. Such transportation of pupils attending nonpublic schools shall be provided during regular school hours on such dates and periods that the nonpublic school not operated for profit is in regular session, according to the school calendar officially adopted by the directors of the same in accordance with provisions of law. The board of school

directors shall provide such transportation whenever so required by any of the provisions of this act or of any other act of Assembly.

The first sentence of the paragraph quoted provides that transportation will be provided for pupils attending public and non-public schools not operated for a profit which are located within the School District boundaries of their residence or within ten miles of the boundaries of such school district. The second sentence of the Act as amended requires that pupils attending non-public not-for-profit schools be provided with transportation to and from field trips "identical" to that provided to public school pupils.

Both the School District and the Association apparently contend that the word "identical" in the second sentence of the above-quoted paragraph modifies the standard of the transportation which the Act requires be provided to non-public school pupils so that students attending non-public schools may only receive transportation "identical" to that transportation provided to public school pupils. The argument is erroneous and must fail for two reasons.

First, the word "identical" would, if interpreted to provide the standard of all transportation for non-public school pupils, require all non-public school pupils to be transported only to public schools. The word "identical" means exactly alike, equal, or the very same. If "identical" transportation were to be provided, the non-public school pupils would have to be loaded onto busses following the same routes that they have followed in the past. Those routes lead only to public schools. Such a result is absurd and is clearly not the intention of the drafters of Act 372. Section 3 of the Statutory Construc-

tion Act of 1970, 1 Pa. S. 1922, provides, in pertinent part,

> In ascertaining the intention of the General Assembly in the enactment of a statute the following presumptions, among others, may be used:
>
> (1) That the General Assembly does not intend a result that is absurd, impossible of execution or unreasonable.

Such a statutory presumption would, alone, dispose of the first argument presented by the School District and the Association.

Second, the term "identical", from its position and use in the second sentence of Act 372, is clearly limited in its discription (sic) to field trip transportation. The second sentence of Act 372 pertains entirely to field trip transportation and it is the only sentence in which the term "identical" is used to describe transportation requirements. Certainly, was the General Assembly to use the term "identical" to create or describe the standard set for all transportation to and from public and non-public not-for-profit schools, that body and the drafters of Act 372 would have included the term in the first sentence of the Act. It chose not to do so because its intent was not to require "identical" transportation to and from all schools.

The General Assembly did not require "identical" transportation to and from schools for both public school pupils and non-public school pupils because such a requirement would have made Act 372 unworkable and futile. History has made such a standard in a free transportation act unworkable. In the development of both public and private schools and school systems, the

geographic areas served by the two systems did not generally coincide. Whether created and operated by religious groups or by private educators, private schools did not commonly draw from the same population base or geographic area as their public counterparts. The forces which created the political subdivision which became the various school districts within the Commonwealth of Pennsylvania did not operate in the same way to create identical geographic drawing areas for non-public schools. As a result, any statutory scheme which is designed to provide transportation by public school districts to pupils attending non-public schools must not be limited to the geographic boundaries of the school district. To restrict transportation to the geographic boundaries of a school district would give less-than-meaningful transportation to pupils attending non-public schools. Such transportation would give pupils attending non-public schools less-than-equal treatment under the Act and would possibly even infringe upon their constitutional rights.

Realizing this, the General Assembly did not include the term "identical" in the first paragraph of Act 372 because it did not want to impose that restrictive standard on the transportation required by the Act. That decision and intent is clear from the language of the statute itself and the placement of the words within the statute. Consequently, there is no need for interpretation at variance with such clear language. Section 3 (b) of the Statutory Construction Act of 1970, 1 Pa. S. 1921 (b) states as follows:

> When the words of a statute are clear and free from all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit.

Such a statutory construction direction applies here. The term "identical", separated by an entire sentence from the language requiring transportation to and from all schools, cannot be intelligently or legally interpreted to modify that standard.

While arguing that a proper interpretation of Act 372 would not require transportation of non-public not-for-profit school pupils beyond the geographic boundaries of a school district, both the School District and the Association argue that the Department of Education's interpretation of Act 372 is in conflict with Section 23.22 of the Department's own regulations. Section 23.22 (22 Pa. Code 23.22) provides as follows:

> (a) When it is necessary to extend the scope of pupil transportation service, provided by one or more of the specified vehicles providing this service in a school district, a properly executed supplement to the agreement or record shall be submitted to the Department of Education for approval of operation.
>
> (b) The following conditions warrant such supplement:
>
> (1) The route must be extended to accommodate pupil load.
>
> (2) A rerouting of vehicles is made necessary by highway construction or official detours.
>
> (3) It becomes necessary that a noon run be established to take kindergarten pupils to and from school.
>
> (4) For all anticipated late afternoon runs not included in the normal daily scheduled transportation program.

> (5) Additional regular transportation for nonpublic school pupils on days when the public schools are not in session.

The School District can show this hearing examiner no language whatsoever in the cited regulation which is inconsistent with the mandates of Act 372. There is no language, either explicit or implied, which prohibits the transporting of resident pupils, whether attending public or non-public schools, across school district boundaries.

Furthermore, even if the cited regulations expressly prohibited such transportation it is too clearly established to need citation that a statutory requirement enacted by the General Assembly supersedes and overcomes any inconsistent administrative regulations. Whether the regulation predated Act 372 or not, to the extent that the regulation is inconsistent with the mandates of Act 372, it is invalid and cannot stand in the way of the performance of Act 372. As such, whether or not the requirements of the regulation were considered by the Department of Education in enforcing Act 372 is irrevelant.

Unfortunately, there is no judicial interpretation of Act 372 which disposes of the precise issue regarding the interpretation of the Act as authorizing and mandating transportation of pupils beyond school district boundaries. The only case to come before the Courts discussing Act 372 in any way analogous or remotely related to the issue at hand is *Garnet Valley School District* vs *Hanlon,* 15 Pa. Cmwlth. 476; 327 A 2d. 215 (1974). In *Garnet Valley,* the Commonwealth Court adopted and approved, verbatim, the opinion of the Court of Common Pleas below. In that opinion, the Court

addressed the issue of whether a Pennsylvania school district was required by Act 372 to provide transportation to non-public schools which were located within ten miles of its district boundaries but located outside the geographic boundaries of the Commonwealth of Pennsylvania. The opinion quickly disposed of the contention by the School District that the ten-mile limit was restricted by the boundaries of the Commonwealth.

> In so far as the regular bussing of children is concerned, the Act states no requirement that the ten-mile limitation upon children attending schools not for profit is limited to the confines of the Commonwealth. Indeed, there would be no logic for such a position since the cost base is the same regardless of whether the children are transported from Concord to Chester or to Wilmington. It is not for the Court to add to a Statute by interpreting a requirement which the legislature did not see fit to include . . . (cites omitted) (327 A 2d. 215 at 217)

The same issues raised here were not directly raised or resolved in *Garnet Valley*. In that case, the school district conceded that it transported other resident pupils to non-public schools located outside its boundaries but within the ten-mile limit which were located within the Commonwealth. Nevertheless, the decision, at least by implication, approves the ten-mile limit thus set by the Statute. Although the case is not dispositive of the issue here, it must be seen as lending some support to the interpretation of the Act advanced by the Department.

II. Authority of the Secretary of Education to Withhold Reimbursement Funds

The Association argues that the Secretary of Education is not authorized to withhold pupil transportation reimbursement funds for failure by a school district to comply with the requirements of a statute as interpreted by the Secretary of Education. In response, the Department cites two sections of the Public School Code, Section 1357 of the Public School Code of 1949 (24 P.S. 13-1357) provides as follows:

> The Superintendent of Public Instruction upon due hearing, after two weeks' written notice to the board of school directors affected, may withhold and declare forfeited any part, or all, of the State appropriation of any school district which refuses or neglects to comply with and to enforce the provisions of this article in the manner satisfactory to him.

Section 2543 of the Public School Code of 1949 (24 P.S. 2543) provides as follows:

> The Department of Public Instruction may, for cause specified by it, withhold such reimbursement, in any given case, permanently, or until the school district has complied with the law or regulations of the State Board of Education.

The express statutory language of both provisions gives the Secretary of Education and his department the exclusive discretion to determine when funds should be withheld or forfeited for non-compliance with the law or the regulations of the Department of Education. A clearer statutory grant is difficult to imagine.

The argument made by the Association that a school board cannot be sanctioned under either of these statutory provisions when it is following the legal interpretation and advice of its solicitor, if accepted, would destroy entirely the effectiveness of the statutory provisions. Such an argument, if accepted, would thwart the authority vested in the Department of Education to require the school boards of the Comomnwealth to comply with the statutes of the Commonwealth or the regulations of the Department. It is the duty and function of the Secretary of Education to enforce the regulations and statutes as he and his department interpret them. Any school district or party aggrieved by such an interpretation has a proper recourse to judicial review and cannot avoid the enforcement authorities granted to the Secretary and the Department of Education without the argument presented here by the Association. Should the argument be accepted, school districts would be able to violate the regulations of the Department of Education and the statutes of the Commonwealth with impunity, as the statutes provide no other sanction immediately available to the Secretary and the Department of Education. Such a result cannot be allowed.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF EDUCATION

IN THE MATTER OF THE ADMINISTRATIVE HEARINGS UNDER ACT 372 SCHOOL DISTRICT OF PITTSBURGH	File No. 1974-4

Final Order

AND NOW, this 25th day of August, 1976, upon consideration of all the testimony presented in the above-captioned hearing, it is hereby Ordered and Decreed that:

1. The School District of Pittsburgh must transport all eligible non-public school children beyond the school district boundaries in accordance with the ten mile mandated requirement in Act 372, December 29, 1972, P.L. ....., No. 372, §1, 24 P.S. §13-1361.

2. All transportation subsidies paid to the School District of Pittsburgh pursuant to Act 372, 24 P.S. §13-1361, for the 1973-1974 school year shall be recovered and hereby withheld from the transportation subsidies now due the district until:

   a. The school district transports all eligible non-public school children, and

   b. Until the school district agrees to reimburse the parents of the non-public school children for all past legitimate transportation costs incurred during the years the school district was acting in violation of Act 372, namely 1973-1974, 1974-1975 and 1975-1976.

John C. Pittenger

Secretary of Education

IN THE MATTER OF THE ADMINISTRATIVE HEARINGS UNDER ACT 372: SCHOOL DISTRICT OF PITTSBURGH	COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF EDUCATION FILE NO. 1974-4

Amended Order

AND NOW, technical matters having been brought to my attention, I hereby amend my *Final Order* in the above-captioned matter as follows:

1. The School District of Pittsburgh's Motion for Oral Argument (August 11, 1976) on the proposed report of the Hearing Officer, Samuel L. Andes, in the above-captioned matter, was implicity denied by my issuance of the Final Order on August 25, 1976 and is hereby explicity denied by this Order; and

2. The report of said hearing officer dated August 19, 1976, and attached to my Final Order of August 25, 1976, is hereby explicitly incorporated by reference.

3. The Final Order, as amended, may be appealed to Commonwealth Court according to the Rules of Appellate Procedure effective on July 1, 1976.

JOHN C. PITTENGER
John C. Pittenger
Secretary of Education

Dated: August 30, 1976

IN THE
SUPREME COURT OF PENNSYLVANIA

SCHOOL DISTRICT OF PITTSBURGH, Petitioner, v. COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF EDUCATION, Respondent, and JOSEPH SCOTT and HELEN SCOTT, his wife and ALPHONSE GREPPI and GLORIA GREPPI, his wife, Intervenors, and PATRICK MAIETTA and KATHY MAIETTA, his wife, DAVID SLAIN and BETTY SLAIN, his wife, BERNARD CONNOR and JOANNE CONNOR, his wife, ANGELO BORELLI and PATRICIA BORELLI, his wife, and PAUL DONGILLI and PATRICIA DONGILLI, his wife, Intervenors.	No. 101 March Term, 1978

Notice of Appeal to The Supreme Court of The United States

Notice is hereby given that the School District of Pittsburgh, Petitioner-Appellant above-named, hereby appeals to the Supreme Court of the United States from the final judgment of the Supreme Court of Pennsylvania entered in this action on January 24, 1979.

This appeal is taken pursuant to 28 U.S.C. §1257(2).

ROBERT J. STEFANKO
Robert J. Stefanko
Solicitor

PERSIFOR S. OLIVER, JR.
Persifor S. Oliver, Jr.
Assistant Solicitor

(Attorneys for Petitioner)

Proof of Service

I hereby certify that I am this day serving a copy of the foregoing NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES upon the persons and in the manner indicated below, pursuant to Rule 33 of the Supreme Court of the United States. All parties required to be served have been served via:

United States mail, first class postage prepaid, and addressed as follows:

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DATED: February 22, 1979

Supreme Court, U. S.
FILED
MAY 31 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1978

No. 78-1614

SCHOOL DISTRICT OF PITTSBURGH,
Appellant,

v

COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF EDUCATION,
Appellee,

and

JOSEPH SCOTT and HELEN SCOTT, His Wife, ALPHONSE GREPPI and GLORIA GREPPI, His Wife, PATRICK MAIETTA and KATHY MAIETTA, His Wife, DAVID SLAIN and BETTY SLAIN, His Wife, BERNARD CONNOR and JOANNE CONNOR, His Wife, ANGELO BORELLI and PATRICIA BORELLI, His Wife, and PAUL DONGILLI and PATRICIA DONGILLI, His Wife,
Intervenor-Appellees.

On Appeal From the Supreme Court of Pennsylvania.

MOTION TO DISMISS OR AFFIRM.

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Date: May 31, 1979.

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MOTION TO DISMISS OR AFFIRM.

Pursuant to Rule 16 of the Rules of this Court, Intervenor-appellees move to dismiss this appeal, or in the alternative to affirm the judgment below, on the ground that it presents no substantial federal question warranting plenary review by this Court.

QUESTION PRESENTED.

The Pennsylvania General Assembly has enacted a statute which provides for the expenditure of tax-raised funds to pay for the free transportation of public and non-public school pupils to and from the schools they lawfully attend. This litigation poses a single question:

> The Commonwealth having enacted such a statute for the general public welfare, does the Establishment Clause require the Commonwealth to exclude from the benefits of that statute those children—and only those children—who require transportation to religiously affiliated schools?

COUNTERSTATEMENT OF THE CASE.

The Commonwealth of Pennsylvania, through Section 1361 of its School Code, 13 P. S. § 13-1361, has adopted a statewide policy of providing free transportation for Pennsylvania children to and from the schools in which they are lawfully enrolled. Section 1361 reflects the policy of the Commonwealth that the transportation afforded be "identical" as between those children attending nonpublic schools and those children attending public schools.

Pennsylvania's first school transportation statute was enacted in 1911. Act of May 18, 1911, P. L. 309, § 1404. Since that time transportation services to Pennsylvania children have been gradually augmented in the interests of the "health, welfare and safety of the children of the Commonwealth." Act of June 15, 1965, No. 91, P. L. 133. While nonpublic school children had not been included as beneficiaries under earlier enactments, in 1965 the General Assembly broadened its legislation to include transportation services to such children along established public school bus routes. That statute was challenged as violating the Establishment Clause. The Supreme Court of Pennsylvania rejected that challenge. *Rhoades v. School District of Abington Township,* 424 Pa. 202 (1967). The plaintiffs therein appealed to the Supreme Court of the United States. This Court both dismissed the appeal, 389 U. S. 11 (1967), and denied a petition for certiorari in the companion case, *Worrell v. Matters,* 389 U. S. 46 (1967).

Experience with the 1965 enactment showed that—due to the irregularity of contours of public school districts and the fact that the areas within which parents find nonpublic schools for their children do not conform to those contours—the purpose of such a law ("to help parents get their children . . . safely and expeditiously to and from accredited schools", *Everson v. Board of Education,* 330 U. S. 1, 18 (1947)) was not being achieved. Many children attending nonpublic schools were excluded from enjoyment of a constitutionally valid public welfare benefit—not because they attended religious or other nonpublic schools—but solely by reason of the accident of the location of a particular school in relation to a public school district boundary line. In 1972 the General Assembly amended Section 1361 in order to remove the

absolute confinement of transportation of *public and nonpublic* school children to the geographical area of the public school district wherein the child resides. A tolerance of ten miles outside-the-district travel was written into the law.*

Appellant, since the enactment of Act 372 in 1972, has refused to comply with its provisions insofar as it provides for the transportation of nonpublic school children whose homes are in the school district but whose schools of lawful attendance lie beyond the school district boundary line. These have numbered between 2,000 and 3,000 children in each of the past six years. (See figure of 2,279 for the school year 1974, in Jurisdictional Statement, 8). The Secretary of Education, following hearing, ordered appellant to comply with the mandate of the Act by providing transportation to resident children attending nonpublic schools located within ten miles of the district boundary. Appellant sought review in the Commonwealth Court of Pennsylvania, which, on February 10, 1978, affirmed the order of the Secretary of Education. Appellant thereafter appealed to the Supreme Court of Pennsylvania. On January 24, 1979, that court affirmed the decision of the Commonwealth Court. *Springfield School District, et al. v. Commonwealth of Pennsylvania, Dept. of Education, et al.,* — Pa. —, 397 A. 2d 1154 (1979). On February 22, 1979, the appellant appealed to the Supreme Court of the United States.

* Attendance by public school students at public schools beyond the boundaries of the school district of residence has long been allowed by statute in Pennsylvania. See 24 P. S. §§ 13-1313, 13-1315.

ARGUMENT.

No Substantial Federal Question Is Presented.

This Court has already resolved the issue raised by the appellant. It has held that the furnishing by public school districts of free bus transportation to children attending religious schools, as part of a general program for pupils attending public schools, is not state support of religion. *Everson v. Board of Education*, 330 U. S. 1, 16-18 (1947). The Court, on the contrary, held that to deny those children, solely on the ground that they are enrolled in religious schools, protection against "the serious danger of traffic accidents going to and from parochial schools" would constitute a denial to them of religious liberty. *Id.* at 16-18.

Appellant seeks to have this Court void Pennsylvania's six-year old program on the *sole* ground that that statute authorizes school districts to transport nonpublic school children (including those in religious schools) beyond district boundary lines. From this appellant argues (a) that "pupils attending nonprofit sectarian schools in Pennsylvania will receive greater benefits in the form of free transportation than their public school counterparts" (Jurisdictional Statement, 13) and (b) that therefore the program violates the Establishment Clause.

As to the first contention, the Supreme Court of Pennsylvania held that the statute confers *equal* benefits upon public and nonpublic school students:

> "The statute requires that nonpublic school students receive transportation opportunities 'identical' to those accorded public school students with the proviso that the district is not required to bus *any* student farther than ten miles from the district's borders. 'Identical' in this context means that public and nonpublic school

> students must be bused *to their schools* if such schools are within the ten mile limit. School district boundaries are not sacrosanct; they are only flexible political lines drawn to accommodate the efficient administration of the educational system of this Commonwealth. It was clearly within the power of the General Assembly to enact the ten mile proviso in Act 372." *Springfield School District*, — Pa. —, 397 A. 2d 1154, 1163 (1979).

As to appellant's second contention, the Supreme Court of Pennsylvania was correct in holding that this program created no violation of the Establishment Clause. Since busing outside a school district does not create any inequality or advantage in favor of any nonpublic school child (whether that child's school is sectarian or nonsectarian), it is the *religious* character of a school which appellant urges as the criterion for denying transportation benefits to children who, by reason of religion, attend out-of-district religious schools. Thereby appellant directly contradicts the teaching of this Court in *Everson*, that a state must not be prohibited "from extending its general state law benefits to all its citizens without regard to their religious belief." *Everson, supra*, at 16.

Appellant's reliance upon case authority to support its contentions is misplaced. *Luetkemeyer v. Kaufman*, 419 U. S. 888 (1974) involved a claim that the failure of Missouri to provide bus transportation for children attending religious schools violated their equal protection and free exercise rights. Missouri, unlike Pennsylvania, had not enacted a statute providing transportation for public and nonpublic school children generally. The case is not in point. *Wolman v. Walter*, 433 U. S. 229 (1977) which concerned, *inter alia*, entanglements arising out of the religious school administrator's controlling field trips by

bus, is not in point. Here the transportation is entirely under public control. *Americans United For Separation of Church and State v. Benton,* 413 F. Supp. 955 (S. D. Iowa, 1975) and *Members of the Jamestown School Committee v. Schmidt,* 427 F. Supp. 1338 (D. R. I., 1977) each involved statutes which confined public school pupils to transportation within their districts but provided for the transportation of nonpublic school pupils beyond district lines. The Iowa program reviewed in *Benton,* moreover, provided an economic penalty (in order to discourage competition among school districts) to the public school child who desired to attend school beyond the district line, whereas no such burden was placed on the nonpublic school child. The Rhode Island statute reviewed in *Schmidt* had the additional feature of being tied directly into church programs to consolidate, or regionalize, parochial schools, thus producing excessive church-state entanglements. None of the disqualifying features of the Iowa or Rhode Island programs are found in the Pennsylvania statute.

CONCLUSION.

It is respectfully submitted that this Court should dismiss this appeal for lack of a substantial federal question.

Respectfully submitted,

WILLIAM B. BALL,
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PHILIP J. MURREN,
Attorneys for Intervenor-Appellees.

May 31, 1979

Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

October Term, 1978
No. 78-1614

SCHOOL DISTRICT OF PITTSBURGH,
Appellant

v.

COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF EDUCATION,
Appellee

On Appeal From the Supreme Court of Pennsylvania

MOTION TO DISMISS OR AFFIRM

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STATUTE:

Act of December 29, 1972, P.L. 1726, 372, amended Section 1361 of the Public School Code of 1949, Act of March 10, 1949, P.L. 30, Article XIII, as amended, 24 P.S. Section 13-1361 ..... 1, 3, 5

MOTION TO DISMISS OR AFFIRM

The Appellee in the above entitled case moves the Court to dismiss this appeal, or, in the alternative, to affirm the judgment of the Supreme Court of Pennsylvania on the ground that the federal question sought to be reviewed was correctly decided by the court below.

STATUTE INVOLVED

Pennsylvania's Act 372 of 1972 (Act of December 29, 1972, P.L. 1726, 372, amended Section 1361 of the Public School Code of 1949, Act of March 10, 1949, P.L. 30, Article XIII, as amended, 24 P.S. Section 13-1361) is set out verbatim in Appellant's Jurisdictional Statement at page 4.

QUESTION PRESENTED

Does Act 372 violate the Establishment Clause of the First Amendment to the United States Constitution as a law respecting the establishment of religion?

STATEMENT OF THE CASE

The parties in this case are the School District of Pittsburgh, Appellant, and the Pennsylvania Department of Education, Appellee. Appellee has a statutory duty to uphold the laws of the Commonwealth relating to public and nonpublic schools.

The Appellant School District, prior to the effective date of Act 372 instituted a local school board policy which, contrary to Act 372, failed to provide transportation for pupils attending nonpublic schools located outside the district's boundaries. In 1974 the Appellee Pennsylvania Department of Education issued orders to show cause to Appellant asking it to explain why it refused to transport all eligible nonpublic school pupils pursuant to Act 372. An adjudicatory hearing was held in January 1975. Contending that Act 372 was unconstitutional under the Federal Constitution, Appellant protested that enforcement action should not be taken against it. The Appellee issued final orders in August 1976, finding the Appellant to be in violation of Act 372. The Secretary of Education ordered the Appellant to transport all eligible nonpublic school pupils to and from the schools in which they were lawfully enrolled if those schools were within the public school district or outside the district and within the statutory ten mile limitation.

The district appealed this order to the Commonwealth Court of Pennsylvania. The Commonwealth Court on February 10, 1978 by opinion and order af-

firmed the order of the Secretary of Education. The district appealed this opinion and order to the Supreme Court of Pennsylvania. The Supreme Court of Pennsylvania affirmed the opinion and order of the court below on January 24, 1979. *School District of Pittsburgh v. Commonwealth of Pennsylvania,* 397 A.2d 1154 (1979).

MOTION TO DISMISS

The Case Presents No Substantial Federal Question

This appeal raises the question of the constitutionality of Pennsylvania's "Pupil Transportation" Act (Act of December 29, 1972, No. 372, P.L. 1726, 24 P.S. §13-1361, as amended).

This statute (hereinafter referred to as "Act 372") provides the same transportation benefits to both public and nonpublic school pupils, namely, transportation to and from the shools in which they are enrolled. For purposes of reimbursement by the state, Act 372 establishes a maximum ten mile limitation on the transportation provided by public school districts to pupils enrolled in nonpublic schools. Insofar as the statute provides transportation "to and from school" for all resident pupils, the transportation benefits are the same for public and nonpublic school students alike.

Since the decision in *Everson v. Board of Education of Ewing Township, N.J.,* 330 U.S. 1 (1946), it has been well established that the Supreme Court will only strike down a state statute if it is clearly beyond the state's constitutional power.

Appellant's assertion that the affirmation of the decision below in *Luetkemeyer v. Kaufman,* 419 U.S. 888 (1974), is a decision "not to extend nonpublic school transportation beyond the *Everson* parameters" (Jurisdictional Statement at 9), ignores the fact that

the Missouri statute, unlike the Pennsylvania statute, simply did not provide nonpublic school transportation.

Similarly, *Americans United for Separation of Church and State v. Benton,* 413 F. Supp. 955 (S.D. Iowa, 1975), is clearly distinguishable on its facts. That case involved a statute which sought to provide transportation to students in contravention of a statutory prohibition against transportation of public school pupils across district boundaries. There is no such statutory prohibition in Pennsylvania. In fact, public school pupils in Pennsylvania may attend schools in other states (Public School Code of 1949, as amended, P.L. 30, 24 P.S. §13-1315) and in other districts (*Id.* at 24 P.S. §13-1313).

The third case cited by Appellant is similarly distinguishable. *Members of the Jamestown Committee v. Schmidt,* 427 F. Supp. 1338 (D.R.I., 1977). Under the Rhode Island school laws, as under the Iowa school laws, public school children could be transported "only within the local school districts." As stated above, this is not the situation under the Pennsylvania school laws. Also, in *Schmidt* the District Court pointed with favor to "the requirement announced in *Everson* . . . that benefits be provided in common, substantially equally, without distinctions between children attending sectarian and public schools." *Id.* at 1348. Thus, neither *Benton,* nor *Schmidt,* creates any conflict with this Court's decision in *Everson.*

Finally, Appellant's request that this Court's prior decision in *Everson* be reconsidered would upset the long-established constitutional precedent of "benevolent neutrality," *Walz v. Tax Commission,* 397 U.S. 664 (1979), and overturn the practice of many states to legislate health and safety measures for children and to provide constitutionally permitted state programs such as "[b]us transportation . . . supplied in common to all students." *Lemon v. Kurtzman,* 403 U.S. 602, 616 (1971).

MOTION TO AFFIRM

A previous Pennsylvania statute permitting the transportation of nonpublic school pupils was challenged in this Court in 1967 on Establishment Clause grounds and this Court dismissed the appeal, *Rhoades v. School District of Abington Township,* 389 U.S. 11 (1967), and denied a petition for *certiorari* in the companion case, *Womell v. Matters,* 389 U.S. 46 (1967).

As recently as 1970, this Court discussed and cited with favor its earlier *Everson* case in *Walz.* Even more recently, in 1977, this Court decided another pupil transportation case, had the opportunity to reverse its holding in *Everson* and did not do so. *Wolman v. Walter,* 433 U.S. 229, 97 S.Ct. 2593, 53 L.Ed. 2d 714 (1977). Nevertheless, Appellant is now asking this Court to reverse itself and the law pronounced in the *Everson* case.

Wherefore, Appellee respectfully submits that the questions upon which this cause depends are so unsubstantial as not to need further argument, and Appellee respectfully moves the Court to dismiss this appeal, or, in the alternative, to affirm the judgment and order in this cause by the Supreme Court of Pennsylvania.

Respectfully submitted,

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May 22, 1979